United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

290

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,214

RAYMOND DEAN, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit
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October, 1962

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellant, the appeal in this case presents the following questions for decision by the Court:

1. Did the trial court commit reversible error in its instructions to the jury concerning the credibility of witnesses? This question presents the following specific sub-questions:

   a. Did the trial court commit reversible error in erroneously instructing the jury that defense counsel had described the testimony of the complaining witness, which he argued was false, concerning her trip to the party at which the alleged assault took place as immaterial?

   b. Did the trial court commit reversible error by its inclusion in its instructions to the jury, relating to effect of false testimony upon the credibility of witnesses, the phrase "that was not a material fact," in reference to testimony of the complaining witness, which appellant contended was false, concerning her trip to the party involved?

   c. Did the trial court commit reversible error in such instructions by the inclusion therein of the qualification "if you deem it wise to do so," in referring to the jury's discretion to disregard the testimony of a witness who had testified falsely concerning a material fact?

2. Did the trial court commit reversible error in not charging the jury, as requested by appellant, that the Government had the burden of proving beyond a reasonable doubt that the alleged assault was not accidental?

3. Did the trial court commit reversible error in not granting appellant's motion for judgment of acquittal?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,214

RAYMOND DEAN, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal From the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

This case involves an appeal by Raymond Dean from a final order and judgment of the United States District Court for the District of Columbia, dated January 8, 1960, adjudging the appellant guilty of an assault with a dangerous weapon and committing him to imprisonment for a period of three (3) years to nine (9) years (JA 37).[1]

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[1] Reference is to pages of the Joint Appendix.

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court in this case is founded on Title 11, Sections 305 and 306, and Title 22, Section 502 of the District of Columbia Code, 1961 Edition.

This jurisdiction was invoked by indictment filed October 5, 1959, in the District Court charging that on or about April 13, 1958, within the District of Columbia, the appellant made an assault on Sallie B. Alston with a dangerous weapon, that is, a pistol. (JA 1).

The jurisdiction of this Court to review the final judgment of the District Court rests on Title 28, Section 1291 of the United States Code (28 U.S.C.A., Section 1291). This jurisdiction was invoked by a notice of appeal and an application for leave to prosecute an appeal without prepayment of costs filed in the District Court on January 20, 1960, denied by that court on January 22, 1960, a petition filed in this Court on May 2, 1961, for leave to appeal without prepayment of costs, and a motion filed in this Court under Rules 39(a) and 45 (b)(2) of the Federal Rules of Criminal Procedure on December 28, 1961, for leave to perfect an appeal to proceed without prepayment of costs.

By order dated July 19, 1962, this Court allowed appellant to prosecute an appeal without prepayment of costs.

STATEMENT OF CASE

On August 5, 1959, appellant was indicted on the charge of assaulting one Sallie B. Alston with a dangerous weapon, i.e. a pistol, within the District of Columbia (JA 1). On October 9, 1959, appellant was arraigned upon the indictment and pleaded not guilty thereto (JA 1, 2).

Thereafter, on November 1, 1959, appellant was tried in the District Court (JA 2-35) and was found guilty by the jury (JA 35). Pursuant to this conviction, the District

Court, on January 11, 1960, entered a judgment and commitment adjudging the appellant guilty as charged and convicted, and sentencing him to imprisonment for a period of three (3) to nine (9) years (JA 37).

On January 20, 1960, the appellant filed with the District Court a notice of appeal and an application for leave to prosecute an appeal without prepayment of costs which was denied on January 22, 1960.

On October 13, 1960, appellant filed with the District Court pursuant to Title 28, Section 2255 of the Judicial Code (28 U.S.C.A., Section 2255) a motion to vacate judgment and set aside sentence. (JA 37-39). This motion was denied by the District Court on February 23, 1961 (JA 40).

On May 2, 1961, the appellant filed a petition in this Court for leave to prosecute an appeal without prepayment of costs, which was supplemented by motion dated December 28, 1961, asking the Court pursuant to Rule 39(a) and Rule 45(b)(2) of the Federal Rules of Criminal Procedure to grant appellant leave to perfect an appeal from the judgment of the District Court entered January 11, 1960, and to prosecute such an appeal without prepayment of costs.

This Court by per curiam order dated July 19, 1962, allowed appellant to prosecute an appeal without prepayment of costs.

STATUTES AND RULES INVOLVED

This case primarily involves Title 22, Section 502 of the District of Columbia Code, 1961 Edition, which reads as follows:

> "Every person convicted of an assault with attempt to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years."

There is also involved Rules 29(a) and Rule 30 of the Federal Rules of Criminal Procedure. Rule 29(a) reads as follows:

> "Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right."

Rule 30 reads as follows:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

STATEMENT OF THE POINTS ON WHICH APPELLANT RELIES

Appellant relies in this case upon the following points:

1. The trial court committed reversible error in giving erroneous and confusing instructions to the jury on the issue of the credibility of witnesses. Under this point appellant relies on the following contentions:

a. That the trial court erroneously advised the jury that defense counsel had stated that the testimony of the complaining witness, which appellant asserted to be false, concerning her trip to the party at which the alleged assault occurred, was not with respect to a material fact. Defense counsel, to the contrary, had argued that much testimony did cover a material fact.

b. The trial court erred by including in its instructions to the jury on the effect of false testimony upon the credibility of a witness the comment "—that was not a material fact—" an apparent reference to the testimony of the complaining witness, which appellant contended was false, concerning her trip to the party at which the alleged assault occurred.

c. The trial court erred by instructing the jury that, if it believed that any witness had testified falsely to any material fact concerning which the witness could not possibly have been mistaken, the jury was at liberty "if you deem it wise to do so" to disregard the entire testimony of that witness or any part thereof. The inclusion of the qualification "if you deem it wise to do so" in the charge is a qualification that does not appear in the acceptable instructions on this point and provides a standard which is vague and wholly unrelated to any consideration of credibility.

2. The trial court committed reversible error in not charging the jury, as requested by appellant, that the Government had the burden of proving beyond a reasonable doubt that the alleged assault was not accidental.

3. The trial court committed reversible error in not granting appellant's motion for judgment of acquittal.

SUMMARY OF ARGUMENT

I. Appellant contends that the trial court committed reversible error in giving erroneous and confusing instructions to the jury concerning the issue of credibility of witnesses. Appellant bases this contention upon the following considerations:

a. The complaining witness testified that she attended a party in the District of Columbia at which the assault occurred and came to that party alone and in a taxicab. This fact was brought out upon cross-examination of the witness by both defense counsel and the trial court. Thereafter Government witness, Mrs. Phala King, testified that the complaining witness was at the party, but that she came to the party with Mrs. King and a woman named Mary in the latter's car. The testimony of the complaining witness was also contradicted by Government witness King with respect to whether the appellant displayed any unusual attitude at the party and whether or not he was cursing any other persons at the party.

The credibility of the complaining witness was a crucial issue before the jury since, without her testimony, there was no possible basis for convicting appellant. Defense counsel argued to the jury that the complaining witness was not a credible witness and that this was demonstrated, among other things, by her wilful false testimony concerning the material fact of her trip to the party in question. Defense counsel requested an instruction to the jury to the effect that if the jury believed that any witness wilfully testified falsely as to any material matter as to which the witness could not be reasonably or materially mistaken, the jury was at liberty to disregard all or any part of the testimony of such witness. The trial court refused this instruction as covered. In giving an instruction on this point, the trial court commented specifically on the requirement that false testimony concern a material fact and erroneously stated to the jury that defense counsel had argued that the discrepancy in the testimony concerning complainant's trip to the party in question was immaterial. When defense counsel objected to this statement, the trial court insisted that defense counsel had so described the testimony and that the statement of the trial court was correct. The record clearly shows that the trial court was in error. This error of the trial court had

the effect of completely destroying appellant's argument to the jury on the effect of the false testimony of the complaining witness.

b. The trial court included in its charge on the issue of false testimony upon the credibility of a witness the comment "—that was not a material fact—."

The inclusion of this comment in the context of the charge was completely confusing to the jury. It was not clear whether the trial court was referring to what defense counsel allegedly said or whether this constituted an independent comment of the trial court on the testimony in question. Indeed, the trial court itself was confused as shown by the fact that the trial court attempted to justify this comment on the ground that the court was simply repeating what defense counsel said.

If the comment of the trial court could be said clearly to constitute an independent comment of the court on the testimony in question, it was in error because (1) the trial court itself had considered the testimony as relating to a material fact, since it had questioned complaining witness on this fact; (2) the testimony in question was material to the relationship of the complainant, if any, to other witnesses; to the credibility of Mrs. King, a prosecution witness; to the question of whether the complaining witness was in fact at the party in question; and finally to the credibility of the complaining witness herself; (3) false testimony need not be directed to the main issue in a case in order to be material; (4) the testimony of complaining witness claimed to be false was developed on cross-examination and it has been held that every question upon cross-examination is said to be material.

c. In its instructions to the jury on the effect of false testimony upon the credibility of the witness, the trial court charged the jury that if it found that any witness had testified falsely to any material fact concerning which the witness could not possibly have been mistaken, then

the jury was at liberty "if you deem it wise to do so" to disregard the entire testimony of that witness on any part of such testimony. The inclusion in the charge of the qualification "if you deem it wise to do so" introduced a standard wholly unrelated to any consideration of credibility and one which is not to be found in any form of the acceptable charge in Federal Courts on the effect of false testimony upon the credibility of a witness. Such a qualification limits the circumstances under which the jury may disregard the testimony of a witness that it finds to have testified falsely on a material matter.

II. The appellant put up a defense that the shooting of the complaining witness had been an accident. Defense counsel asked for instructions to the jury which would specifically tell the jury that the prosecution must prove beyond a reasonable doubt that the assault upon the complaining witness was not an accident. The trial court refused the requested charge as covered. Instead, the trial court gave a general charge to the effect that the Government had the burden of proving beyond a reasonable doubt that the defendant had committed every element with which he was charged. On the question of appellant's defense of an accident the trial court instructed the jury in substance that if it found that the gun was discharged accidentally without negligence on the part of appellant or if the appellant was negligent it was not gross negligence and reckless and wanton conduct, the jury should find the appellant not guilty. Defense counsel tried to object to the charge as given but was cut off by the trial court. Subsequently, the jury asked for a clarification of the charge as it related to the defense of an accident, and the trial court in substance repeated its earlier charge without advising the jury that the burden of proving the shooting was not an accident rested with the Government.

Appellant contends that the charge was erroneous because it did not make clear to the jury that the burden

of showing that the alleged assault was not an accident rested upon the Government and in fact left the impression with the jury that the burden of showing it was an accident rested on the appellant.

III. At the close of the Government case defense counsel made a motion for judgment of acquittal which was denied by the trial court. The appellant contends that this denial constituted reversible error because the Government did not prove beyond a reasonable doubt either the performance of an act necessary to constitute an assault with a dangerous weapon, nor did it prove that appellant acted with unlawful intent.

It has been the Government's position that the assault consisted of the appellant brandishing a loaded gun which frightened the complainant. The Government's testimony does not show that the appellant pointed the gun in question at anybody, much less complainant. Such testimony is only to the effect that appellant was "flashing" the gun, which simply means that he was displaying it. Moreover, the testimony completely negates the claim that appellant deliberately pointed the gun at complainant since she walked down the stairs and into the hall and in front of appellant knowing that he had the gun in his hand. Complainant's testimony that she was frightened is refuted by her earlier testimony (1) that she moved through the crowd and that she placed herself between the crowd and appellant, and (2) that there was no animosity between her and appellant. Such actions are not consistent with a contention of fright.

Assuming *arguendo* that appellant's "flashing" of a gun was a sufficient performance to support an alleged assault, there still must be proved an unlawful intent in the form of an intent or purpose to injure the complaining witness by putting here in fear or otherwise. There was no testimony to the effect that appellant threatened to shoot complainant or anyone else. The testimony of the complain-

ing witness that the appellant was cursing the people at the party in general was refuted by Government witness King and the Government cannot challenge its own unimpeached witness.

The Government has heretofore recognized the absence of any specific intent by appellant to injure the complaining witness by arguing that the required intent was a general intent consisting of the handling of a loaded gun in a reckless manner with a wanton disregard for others. However, the mere display or handling of a loaded gun, which discharges and wounds another, does not in and of itself establish such a general intent and it is submitted that the evidence of the Government shows no more. In addition, the complaining witness testified that she had told an investigating officer that she didn't know whether the shooting was an accident because there was no reason for appellant to shoot her since they had never had an argument and they were on friendly terms.

ARGUMENT

I

The Trial Court Committed Reversible Error in Giving Confusing and Erroneous Instructions to the Jury Concerning the Determination of the Credibility of the Complainant

The appellant in this case was charged on a one-count indictment with an assault with a dangerous weapon, i.e. a pistol, upon Sallie B. Alston on or about April 13, 1958, within the District of Columbia (JA 1).

The only testimony offered by the prosecution as to the facts surrounding the alleged assault was the testimony of the complainant, Sallie B. Alston (JA 3-6) and of Mrs. Phala King, a friend of the complainant (JA 7-10).

The complainant was the only witness who testified that appellant had a gun in his hand and that he was cursing while holding the gun (JA 3-4).

Mrs. King didn't see a gun and didn't hear any cursing or vulgar language (JA 7-10).

The same is true of witnesses Owen (JA 14-16), Ellis (JA 16-18), and Ways (JA 20-21), who were called by the defense.

The credibility of the complaining witness was, therefore, a crucial issue before the jury. Without her testimony, there was no possible basis for convicting appellant.

In addition to the contradictions of the testimony of the complaining witness noted above, there was a direct conflict between her testimony as to how she came to the party at which the alleged assault took place and the testimony of Mrs. King.

On direct examination, complainant had testified that she was at a party at the home of one Mabel Owens on Maryland Avenue in the District of Columbia on the evening of April 12, 1958 (JA 3). On cross examination, complainant was asked by defense counsel and the trial court as to how she got to the party that night. This question and complainant's answer thereto read as follows: (JA 5)

"CROSS EXAMINATION

"By MR. ROBERTSON:

"Q. Miss Alston, how did you get to the party that night? A. How did I get there?
"Q. Yes. A. I took a cab there.
"Q. Anyone go with you? A. No. I took a cab to the party.
"THE COURT: Was anybody in the cab with you?
"THE WITNESS: No.
"THE COURT: All right."

The Government followed complainant's testimony by bringing to the witness stand Mrs. King. After Mrs. King had testified that she was at the party, the witness was asked by the Government whether or not the complainant

was there. She answered that she knew that complainant was there because they had gone to the party together. This direct testimony reads as follows: (JA 7)

> "Q. Directing your attention to the evening of April 12, 1958, do you recall where you were at that time? A. Well April 12th I went to this party.
> "Q. Where was the party, if you know? A. Well, I don't know the exact address but I do know it was on Maryland Avenue, Northeast.
> "Q. Is that in the District of Columbia? A. Yes, it is.
> "Q. All right. And do you know whether or not Sallie Alston was there? A. Yes, she was there because we went there together.
> "Q. Did you? and how about Raymond Dean? A. He was there when I got to the party."

On cross examination, Mrs. King amplified this testimony by stating that the witness and the complainant had gone to the party in question in the car of a friend named Mary. On being asked as to whether she was sure of this fact, Mrs. King replied, "Sure." This testimony reads as follows: (JA 9)

> "CROSS EXAMINATION
>
> "By MR. ROBERTSON:
>
> • • • • •
>
> "Q. I see. Now, at this party over on Maryland Avenue, you say you went over there with Sallie Alston? A. Sallie Alston went with me and a girlfriend by the name of Mary, she had a car. And Mary and I are very dear friends, we worked together.
> "Q. At Aristo? A. Yes.
> "Q. So Sallie works at Aristo, too, doesn't she? A. Yes, she do.
> "Q. You and your friend Mary went in your friend's car and Sallie went in your friend's car? A. Yes.
> "Q. You're sure of that? A. Sure."

Thus, Mrs. King's testimony directly contradicted that of the complainant as to the means by which she came to

the party. Complainant stated that she came to the party *alone* in a cab (JA 5) and Mrs. King stated that complainant went to the party with Mrs. King in a car owned by a girl friend by the name of Mary (JA 7-9).

Because of the specific contradictions of the testimony of the complaining witness, defense counsel emphasized the issue of the credibility of complainant in his argument to the jury which reads as follows: (JA 22-23)

> "Now as Government counsel said to you as in most criminal cases there is a question of credibility. In other words, if the position advanced by the prosecution and defendant is in conflict, you and you alone are to decide whom you are to believe, where the truth lies.
>
> • • • • •
>
> "Now the Court will instruct you in essence with regard to credibility. I say to you that you are to carry into your deliberations your own experiences as men and women of affairs in judging when a person is telling the truth. You can consider the demeanor of the person, their directness, their forthrightness, their motive to subvert the truth.
>
> • • • • •
>
> "Now let's look at what the Government has proven. Of course, Miss Alston was shot. A very unfortunate occurrence. And, of course, it occurred in the District of Columbia at the address in controversy here. We do not contest the fact that the gun was held by the defendant, Raymond Dean. The only testimony that this occurred in an intentional manner or as a result of unlawful conduct was the testimony of the complaining witness.
>
> "And I say here credibility is crucial, and I wish to call your attention here to testimony about another matter. I say it is a material matter about which she could not have been mistaken, and I say to you that her testimony on that was false.
>
> "You will recall I asked her how did you get to the party and she said she went alone. And then the Government's witness, the second lady to testify, said

that the complaining witness went with her in a car driven by her friend, the three of them went together.

"I say to you, ladies and gentlemen of the jury, if a person will testify falsely, wilfully, about such a matter, when the whole Government case rests on the testimony of that person with regard to this commotion in the hall, then you should disbelieve that, and if you disbelieve that then you have to acquit the defendant."

Defense counsel also asked for the following instruction on the issue of credibility: (JA 36)

"PRAYER FOR INSTRUCTIONS—PRAYER No. 2

"If you believe that any witness wilfully has testified falsely as to any material matter, as to which she could not be materially or reasonably mistaken, you are at liberty to disregard all or any part of the testimony of such witness."

This prayer for instruction was refused as covered (JA 31, 36). The instruction which the trial court gave on the question of the credibility of witnesses reads as follows: (JA 25, 26)

"In determining whether the Government has established the charge against the defendant beyond a reasonable doubt you will consider and weigh the testimony of all the witnesses who have testified before you and all the circumstances concerning which testimony has been introduced.

"You are the sole judge of the credibility of witnesses. In other words, you and you alone are to determine whether to believe any witness and the extent to which any witness should be credited.

"In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you are to take into consideration the witnesses manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you you as having an accurate memory and recollection, and whether the witness has any interest in the outcome of the case. All of those matters as

well as any other factors that appear to you as having a bearing on this matter you may consider and weigh in determining what witnesses to believe and the extent to which you credit them.

"If you find that any witness wilfully testified falsely as to any material fact—mark that well, that word 'material', as used by counsel for the defense, who said the discrepancy of the testimony concerning the arrival of the complainant at the place where the party was held was immaterial—mark well this: if you find they wilfully testified falsely as to any material fact—that was not a material fact—concerning which the witness could not possibly have been mistaken, then you are at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness or any part of such testimony.

"The testimony of one witness whom you may find entitled to full credit is sufficient for the proof of any fact and can justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary."

Defense counsel objected to this charge as inaccurate and his objection was overruled by the trial court. This objection and the Court's ruling thereon read as follows: (JA 31, 32)

"THE COURT: • • • However, your record is complete in that you have taken exception to my refusal of your tender of instructions.

"MR. ROBERTSON: Yes. I would like this to go in the record, if Your Honor please:

"We object to Your Honor's characterization of the testimony of the witness as not being on material fact.

"THE COURT: I copied what you said in your argument. You said it is a material fact. I mentioned that in my charge.

"MR. ROBERTSON: I thought you said it was immaterial.

"THE COURT: You said so.

"MR. ROBERTSON: I say it is a material fact.

"THE COURT: You said it was an immaterial fact. I can see why you did it. You're too good a lawyer not to.

• • • • •

"MR. ROBERTSON: Let the record show our objection to the charge as given.

"THE COURT: Very well."

The instruction given by the trial court and objected to by defense counsel constituted prejudicial and reversible error for the following reasons, any one of which requires a reversal of appellant's conviction:

1. The trial court erred by instructing the jury that counsel for the defense "said the discrepancy of the testimony concerning the arrival of the complainant at the place where the party was held was immaterial" (JA 26). Counsel for the defense had actually said (JA 23) that "it is a material matter about which she could not have been mistaken." When the District Court's attention was called to this error by counsel for the defense, that Court insisted that "you said it was an immaterial fact." (JA 32).

This erroneous statement of appellant's position amounted to an instruction to the jury that counsel for defense conceded that the complaining witness had not testified about a material fact when she testified concerning her trip to the party at which the alleged assault occurred and thus in the context of the instruction in effect told the jury that counsel for the defense agreed that the jury need not consider this testimony in determining the credibility of the complaining witness. This clearly prejudiced both the appellant's general argument as to the credibility of the complaining witness, as well as his specific argument that her testimony should be disregarded because of false testimony on the particular point.

In addition, the trial court's error confused the jury on the issue of credibility. Indeed, the trial court itself was

completely confused by its own instruction as is clearly shown by the colloquy at JA 32, reproduced above. At first, the trial court insisted that the charge mentioned that counsel for the defense had said the false testimony concerned a material fact and then insisted just the opposite, i.e. that defense counsel "said it was an immaterial fact." If the trial court at this point was hopelessly confused, it must be obvious that the jury would also be confused.

The objection of appellant here is not that the trial court commented on the position of appellant, but that such court incorrectly stated the position. That court should either have made a charge on the point, without comment, or if comment was to be made, it should fairly explain to the jury the contentions of the parties with respect to the evidence. A charge should not be misleading. *Bollenbach* v. *United States,* 326 U.S. 607, 614 (1946).

2. The trial court committed reversible error by the inclusion in the charge on the effect of false testimony upon the credibility of a witness of the phrase "—that was not a material fact—". (JA 26). Appellant takes this position for the following reasons:

a. It was totally confusing. In the context of the charge, it could be interpreted as either a reference to what defense counsel allegedly said or a comment of the trial court itself on the weight of the testimony. When defense counsel objected to the characterization (JA 32) the trial court justified it on the ground that the court was simply repeating what defense counsel had said. (JA 32). This was not correct. (JA 23). Thus, the trial court was compounding the error it made in erroneously telling the jury that defense counsel had said the discrepancy involved was immaterial. In addition, it was leaving the situation so that the jury could interpret the statement as a comment by the court itself as to the materiality of the evidence in question, though the court denied to defense counsel that such was its intent. (JA 32).

b. The testimony did relate to a material fact.

First: The testimony by complaining witness was developed on cross-examination (JA 5) of her direct testimony (JA 3) that she was attending a party in the District of Columbia at which the alleged assault occurred. The trial court considered it material because, when defense counsel asked the complaining witness how she got to the party that night and the witness answered by cab, (JA 5), the trial court then addressed the following question to the witness: (JA 5)

> "THE COURT: Was anybody in the cab with you?
> "THE WITNESS: No.
> "THE COURT: All right."

This testimony, contradicted by the prosecution witness, Mrs. King, on direct testimony (JA 7) was clearly material, *inter alia,* to her relations, if any, to appellant, or to any other witness; to the credibility of Mrs. King, a prosecution witness; to the question of whether the complaining witness was in fact at a party in the District of Columbia.

Second: False testimony need not be directed to the main issue in a case in order to be "material". *Newman* v. *United States,* 58 F. 2d 751 (9th Cir., 1932). At page 755, the Court stated as follows:

> "The term 'material matter' refers not only to the main fact which is the subject of inquiry, but also to any fact or circumstance which tends to corroborate or strengthen the proof adduced to establish the main fact."

To the same effect is the statement of the Third Circuit in *United States* v. *Rutkin,* 189 F. 2d 431; aff'd. *Rutkin* v. *United States,* 343 U.S. 130 (1952). At page 439, the Court of Appeals stated:

> "With that trial situation in mind, we find no substantial error in the corrective charge. A conscious falsehood upon a material point was involved. Even

> if the lie had concerned some minor trial item we would be inclined to agree with Professor Wigmore that 'In the nature of character, a person who would lie upon a collateral point is perhaps likely to be a more determined liar than one who dares it only only upon a material point; at any rate there is no less a call to distrust the former than the latter.' Wigmore on Evidence, 3rd Ed. Section 1014."

Indeed, it is enough for a question and answer to be material if it goes to impeaching the credibility of the witness. Thus, in *United States* v. *Neff*, 212 F. 2d 297 (1954), the Third Circuit stated: (page 311)

> "Defendant urges that the questions put to her before the Grand Jury were not material inquiries within the meaning of 18 U.S.C. § 1621. We do not agree. The questions in issue were directed towards impeaching the credibility of the witness. It is well established that interrogation of such an order is material as that term is here employed. United States v. Weiler, 3 Cir., 1944, 143 F. 2d 204, 206, reversed on other grounds, 1945, 323 U.S. 606, 65 S. Ct. 548, 89 L. Ed. 495; Blackmon v. United States, 5 Cir., 1940, 108 F. 2d 572, 573; United States v. Shinn, C.C.D. Or. 1882, 14 F. 447, 453."

Certainly, the question to the complaining witness (JA 5) by defense counsel and the District Court and her answers here involved, were, *inter alia*, directed at impeaching her credibility. Her answers were not simply inadvertent statements made in the course of testifying on some other point.

Third: In *Blackmon* v. *United States*, 108 F. 2d 572 (1940), the Fifth Circuit pointed out that every question on cross-examination of a witness was material. The Court's statement on this point reads: (page 574)

> "In Metcalf v. State, 8 Okl. Cr. 605, 129 P. 675, 680, 44 L.R.A., N.S., 513, supra, it is said quoting Rahm v. State, 30 Tex. App. 310, 17 S.W. 416, 28 Am. St. Rep. 911, 'we think it may be laid down as the rule

that any testimony, which is relevant in the trial of a given case, is so far material to the issue as to render a witness, who knowingly and willfully falsifies in giving it, guilty of the crime of perjury,' and from State v. Lavalley, 9 Mo. 834, 'it is not necessary that the evidence given is material to the main issue; it is sufficient if it is material to any proper matter of inquiry.' Again, 'it is generally held to be perjury to swear falsely to anything affecting the credibility of the witness himself or the credibility of another witness in the case.' 'Any false statements made by a witness, which detracts from or adds weight and force to testimony as to matters that are directly material • • • may constitute perjury • • •' and quoting from Greenleaf on Evidence, 'thus falsehood in the statement of collateral matter, not of substance, such as the day in an action of trespass, or the kind of stuff with which an assault was made, or the color of his clothes, or the like, may or may not be criminal, according as they may tend to give weight and force to other and material circumstances, or to give additional credit to the testimony of the witness himself, or of some other witness in the case. *And therefore every question upon the cross-examination of a witness is said to be material.*' (Italics supplied)

"If this were not so, a witness could on cross examination testify in the freest fashion and with impunity, to any fact he thought would strengthen or support his testimony in chief, if the matters testified to would have been inadmissible on direct, as independent evidence.

"This should not be, it is not, the rule. Authorities supra." [Emphasis theirs]

The testimony of the complaining witness to the effect that (a) she went to the party involved in a cab, and (b) that she went alone, was, as indicated above, elicited on cross-examination in part by questions of defense counsel and in part by questions of the trial court (JA 5). Her answers are certainly open to the inference at least that she knew Mrs. King would testify for the prosecution, and, in the words of the Fifth Circuit, adopting language from other

sources, the complaining witness wanted to "give additional credit to the testimony * * * of some other witness in the case" by disassociating herself from such witness. If the complaining witness was free to give any answer she desired to the questions without any accountability therefor, she could, as the Fifth Circuit points out, testify with impunity to any fact she thought would strengthen her complaint.

3. The charge as given and the refusal of the charge tendered by appellant's trial counsel constituted reversible error without regard to the trial court's comments.

Appellant's counsel tendered in his prayer for instructions No. 2, the proposed charge reproduced at page 14 above, and requoted here for the convenience of the Court in comparing it with the charge as given:

> "If you believe that any witness wilfully has testified falsely as to any material mattter, as to which she could not be materially or reasonably mistaken, you are at liberty to disregard all or any part of the testimony of such witness."

This charge was refused as covered. (JA 36). The charge as given—omitting the trial court's comments—was as follows: (JA 26)

> "If you find that any witness testified falsely to any material fact * * * concerning which the witness could not possibly have been mistaken, then you are at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness or any part of such testimony."

Appellant's counsel objected to the trial court's refusal of the tender of instructions (JA 31), as well as that court's erroneous statement of counsel's argument. (JA 32).

Appellant submits that the trial court's substitute instruction was erroneous on the issue involved.

The question of instructions to the jury dealing with the old maxim "falsus in uno, falsus in omnibus" is a controversial one with respect to which various courts have differed and have from time to time changed their rulings. See: Annotation—"Instruction—Falsus in Uno," 4 A.L.R. 2d pages 1078-1166. However, it is a well established rule in the Federal courts that a party is entitled to an instruction, where credibility is an issue, along the lines prayed for by appellant in this case.

> *Shokuwan Shimabukuro* v. *Higeyoshi Nagayama,* 78 U.S. App. D.C. 271, 140 F. 2d 13 (D.C. Cir., 1941), *cert. den.* 322 U.S. 755
>
> *United States* v. *Rutkin,* 189 F. 2d 431, 438 (3rd Cir., 1951), aff'd *Rutkin* v. *United States,* 343 U.S. 130 (1952)
>
> *Emanuel* v. *Kansas City Title & Trust Co.,* 127 F. 2d 175, 180 (8th Cir., 1942)
>
> *Norfolk & Western Ry. Co.* v. *McKenzie,* 116 F. 2d 632, 635 (6th Cir., 1941)

Also see: *Evans* v. *United States,* 65 F. Supp. 183 (D.C. W.D. Va., 1946), aff'd *per curiam,* 329 U.S. 668 (1946).

The applicable rule is set forth in the *McKenzie* case as follows: (page 635)

> "Appellee's testimony, taken as a whole, is a mixture of truth and falsehood and appellant urges that the principle of falsus in uno, falsus in omnibus, is applicable. However, this maxim is not an inflexible rule of evidence and its application is delegated to the jury under appropriate instructions. The rule is one of permission and not mandatory. The jury may disregard the evidence altogether and should do so if the witness has wilfully sworn falsely to a material fact in the case but they may not be required to do so by the court. The jury is the sole judge of the credibility of the witnesses and any instruction thereon is merely advisory. There is no positive rule of law which excludes evidence from consideration entirely on account

> of the wilful falsehood of a witness as to some portion of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of falsification on all matters about which he testifies but; once a witness is determined by the judge to be qualified to speak, the weight and credibility of every portion of his testimony is for the jury. Under our judicial system, the jury alone is charged with forming a conclusion as to the truth of the testimony offered."

The usual form of the charge is set forth in 4 A.L.R. 2d 1087, 1088, as follows:

> "* * * the instruction runs to the effect that if the jury finds that any witness has wilfully (or 'knowingly,' or 'wilfully and knowingly,' or 'corruptly,' etc.) testified falsely to any material matter they 'may' (or 'are at liberty,' or 'have the right') to 'disregard' (or 'reject' or 'disbelieve') all of the testimony of the witness. In some states an added corroboration clause is required or permitted."

In the *Nagayama* case, *supra*, this Court held that a defendant was entitled to a charge upon the effect of false testimony upon the credibility of the whole testimony of a witness in the following statement: (page 14)

> "The record clearly entitled the defendant to instructions that falsity of some of the items on a particular sheet entitled the jury to find that the entire sheet was false * * *."

It is submitted, that—purely aside from the trial court's comments discussed above—the charge as to the effect of false testimony on the credibility of witnesses was erroneous and prejudicial because it included the phrase "if you deem it wise to do so."

Without this phrase, and without the comments, the charge conformed to the usual charge in Federal courts on the point involved. However, the inclusion of the cited phrase introduced an entirely new element into the pic-

ture, i.e. that the jury could disregard the testimony of a witness whom it had found to have testified falsely on a material point "if you deem it wise to do so." Such a standard is wholly unrelated to any consideration of credibility, is vague, and is not to be found in any form of the charge as on the point involved given in Federal courts. It limits the circumstances under which the jury may disregard the testimony of a witness that it finds to have testified falsely on a material matter to the single situation in which the jury finds "it wise to do so" whereas appellant was entitled to a charge that upon such a finding, the jury was "entitled" to disregard the testimony of the witness involved, using the language of the *Nagayama* case in this Court, *supra,* page 22, or at least that the jury "were at liberty" or "have the right" to disregard such testimony, using the language of other acceptable forms of the charge in Federal courts. The qualification added by the trial court in this case had the effect of shifting the situation in the direction of favoring an acceptance by the jury of the testimony of a witness even though the witness has testified falsely as to a material fact.

II

The Trial Court Committed Reversible Error in Not Specifically Charging the Jury That the Government Had the Burden of Proving Beyond a Reasonable Doubt That the Alleged Assault Upon the Complaining Witness Was Not Accidental

It was the position of defense in the trial below that the alleged assault was an accident (J.A. 28). Defense counsel asked the trial court for the following instructions: (J.A. 35, 36)

> "Prayers for Instructions to the Jury—Prayer No. 1
>
> "It is incumbent upon the prosecution to prove each and every material allegation of the indictment and every element of the offense charged beyond a reasonable doubt. In other words the prosecution must prove

beyond a reasonable doubt that the assault upon the complaining witness was not accidental. If you have a reasonable doubt as to whether or not the assault was accidental or done unintentionally, then you must acquit the defendant.

"*Deson* v. *U. S.*, 97 A. 2 135
Davenport v. *U. S.*, 60 A. 2 226."

• • • • •

"PRAYERS FOR INSTRUCTIONS—PRAYER No. 3

"The prosecution must prove every material element of the offense charged beyond a reasonable doubt. In the case of an assault, the prosecution must prove that the assault was intentional. The government must prove not only the shooting, but that it was unlawful; in other words, that it was not accidental or innocent. You must acquit the defendant unless every material and necessary fact upon which a conviction depends is proven, to the satisfaction of each individual juryman, beyond a reasonable doubt.

"If the government has not, by its proof, ruled out the possibility of accident, or the evidence just as reasonably supports the proposition that the shooting was accidental as that it was intentional, then you must acquit.

"*Egan* v. *United States*, 52 U.S. App. D.C. 384
Williams v. *United States*, 76 U.S. App. D.C. 299
Davenport v. *United States*, 60 A. 2 226."

These requests were refused as covered. (JA 35, 36).

The portions of the charge, as given, covering the matters requested by defense counsel are as follows:

At JA 25 the trial court instructed the jury as follows on burden of proof:

"Every defendant in a criminal case is presumed to be innocent and that presumption attaches to the defendant throughout the trial. The burden of proof, as has been stated to you, is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains that burden and proves

beyond a reasonable doubt that the defendant has committed every element of the crime with which he is charged, the jury must find the defendant not guilty."

The trial court's original instructions as to the defense of accident are found at JA 28, 29 and read as follows:

"The defendant claims that the discharge of the pistol relating to the injury of the complaining witness, Sallie B. Alston, was an accident.

"An accident is defined as the happening of an event without the concurrence of the will of the person by whose agency it is caused.

"If a person negligently handles a firearm and as a result of his negligence the firearm is discharged and the bullet hits another human being, such a person is guilty of assault with a dangerous weapon. It is not necessary that such person should have an intent to hit anyone or even that he should have intent to fire the firearm.

"In order, however, that such person may be guilty of a crime, his negligence must be more than just a failure to exercise ordinary care, but his conduct must be reckless, showing a wanton disregard for the safety of others.

"If the jury finds the defendant's conduct in the handling of the firearm to be grossly negligent, reckless and wanton, showing an utter disregard for the safety of others, the jury should find a verdict of guilty.

"On the other hand, if the jury finds that the firearm was discharged accidentally without any negligence on the part of the defendant or that even if the defendant was negligent it was ordinary carelessness and did not amount to gross negligence, and to recklessness and wanton conduct, the jury should find the defendant not guilty.

"If you do a thing on purpose you do that which you intend to do. Now the intention that a person has in doing a certain act is to be gathered by his actions and by his words at the time and preceding the time. No man can read the secrets of the human mind. And in the administration of justice men must seek the intention and gather it from the words and action of the person involved from the testimony in the case.

"Intent need not be proved directly. The jury may infer intent from the circumstances of the case as disclosed by the evidence."

Defense counsel started to object to this instruction but was cut short by the trial court, as shown by the record at JA 31, which reads in pertinent part as follows:

"THE COURT: I think you will see why I refused your instruction as being covered. I think I covered them pretty well.

"MR. ROBERTSON: Yes, I think you did, Your Honor, but I don't think you covered the prayer No. 3 sufficiently.

"THE COURT: What part of it?

"MR. ROBERTSON: You say we contend if the Government had not ruled out the possibility of accident the shooting was accidental and then was intentional then you must acquit.

"The Court of Appeals in the Williams case says that—

"THE COURT: Listen. I have gone over this carefully. I have had these instructions drawn carefully. I have ruled on what you said before during the trial and I am ruling on it now.

"Deny the motion, or if it is an objection I will overrule the objection.

* * * * *

"THE COURT: The point is negligence might do it in the handling of a firearm. However, your record is complete in that you have taken exception to my refusal of your tender of instructions."

Subsequently, after the jury retired, a request was made by the jury for a clarification of the instructions on the difference between accidental and careless handling of a weapon. The trial court responded as follows: (JA 33-35)

"THE COURT: Bring in the jury.

"(Whereupon the jury entered the courtroom and resumed their seats in the jury box.)

"THE COURT: Ladies and gentlemen of the jury:

"I received your note that you sent before lunch but I thought it would be better to have you go to lunch, and that would give counsel time to go to lunch and get back here.

"It has always been a wonder to me how a jury can remember all of the instructions that a Court gives. And I think what you should do, as you have done here, if there is anything that you are uncertain about in your minds with respect to what the Court said, or you don't quite remember, you should ask for further enlightment.

"The note reads:

> "One of the jurors desires clarification of your instructions to the jury on the difference between accidental and careless handling of a weapon.

"The instructions I gave you this morning, I think if you could have read them, should be sufficiently clear, but in any event, I will try to make them clearer if I can.

"If a person negligently handles a firearm as a result of his negligence the firearm is discharged and the bullet hits another human being, such person is guilty of assault with a dangerous weapon. In order, however, that such person may be guilty of a crime, his negligence must be more than just a failure to exercise ordinary care. His conduct must be reckless, showing a wanton disregard for the safety of others.

"It is not necessary that such person should have an intent to hit anyone or even that he should have an intent to fire the firearm. Now a person with a loaded gun, to the ordinary person of some sense, if he is going to handle that gun should exercise a little more care than if the gun was unloaded, if there was nothing in it. But, of course, it is the unloaded gun that explodes and hits somebody too.

"As far as an accident would be concerned, I would illustrate it this way, although there may be others, that would be this: If a person in taking a gun from a holster or belt or his pocket should drop it on the floor, slip out of his hand and the gun explodes and hits somebody, that would be a pure accident. Or if, perchance, somebody is holding a gun in his hand and

somebody jostles his elbow so that he pulled the trigger or due to the shock of coming in contact with him made it explode, that would be an accident. Those are several illustrations.

"Now, in negligence, of course, in is very essence means careless, but it must be more than the exercise or ordinary care. It must be a reckless thing, it must be something he shouldn't do at all.

"If the jury finds the defendant's conduct in handling the firearm to be grosly negligent, reckless, wanton, showing an utter disregard for the safety of others, the jury should find a verdict of guilty.

"If, on the other hand, the jury finds that the firearm was discharged accidentally without negligence on the part of the defendant, bearing in mind what I have told you about the degree of negligence or that even if the defendant is negligent, if it is ordinary carelessness and did not amount to gross negligence or reckless and wanton conduct, the jury should find the defendant not guilty.

"That is what I gave you this morning, together with some oral instructions to see if I can clarify it for you. I trust that I have.

"Anybody in doubt about it now? Very well.

"If you are distressed or wondering about anything else, the Court is here to act on anything that will help you understand the case.

"Therefore, you will return to your jury room and resume your deliberations."

Appellant submits that this charge was erroneous because it did not make clear to the jury that the burden of showing beyond a reasonable doubt that the alleged assault was not the result of an accident rested upon the Government and, in fact, left the impression with the jury that the burden of showing it was an accident rested on appellant.

Appellant recognizes that it is not necessary for a trial court to repeat the admonition of presumption of innocence and the requirement that the Government must prove every element of an offense to the jury's satisfaction beyond

a reasonable doubt in each and every instruction with respect to each element of an offense where this instruction has been repeated sufficiently to the jury to impress it upon the jury's mind. *Johnson* v. *United States,* 291 F. 2d 150, 157 (Sth Cir., 1961); *Marks* v. *United States,* 260 F. 2d 377, 381 (10th Cir., 1959); *Roberts* v. *United States,* 137 F. 2d 412, 416 (4th Cir., 1943). Appellant also recognizes that the trial court in this case did give a general instruction that the burden of proving every element of crime beyond a reasonable doubt rested on the Government. (JA 25). However, appellant respectfully submits that in the situation here involved the trial court's failure to specifically advise the jury, as requested by defense counsel, that this burden of proof encompassed the appellant's defense of an accident, coupled with the charge given on the issue of an accident, seriously prejudiced the appellant. This prejudice resulted both from the impression left with the jury that the burden of proving the defense rested upon appellant as well as omitting the concept that appellant was entitled to acquittal if there was in the minds of the jurors a substantial doubt concerning whether or not the alleged assault was an accident.

After instructing the jury that defendant claimed that the alleged assault was an accident, the trial court at JA 29 instructed the jury that "if the jury finds that the firearm was discharged accidentally without any negligence on the part of the defendant or that even if the defendant was negligent it was ordinary carelessness and did not amount to gross negligence, and to recklessness and wanton conduct, the jury should find the defendant not guilty." This charge was in substance repeated when the jury asked and received a clarification of instructions on the difference between accidental and careless handling of a weapon. (J.A. 34). The failure of the trial court to have coupled with this instruction a reminder to the jury that the Government had the burden of proving beyond a reasonable doubt that the alleged assault was not an accident

gives rise to a situation almost identical to that involved in *United States* v. *Barrasso*, 267 F. 2d 908 (3rd Cir., 1959) in which the conviction was reversed because of the instructions given.

In that case the defense counsel, as here, requested a specific charge that the Government had the burden of overcoming beyond a reasonable doubt the defense, which in that case an alibi. (page 910). In response, the trial court gave the following instruction: (page 910)

> "Ladies and gentlement of the jury, there has been set up in this trial the defense of alibi. That means that the accused says he was not present, he was somewhere else, and that he could not have participated in this crime. If you believe that, that ends it because if he weren't there at any time he is alleged to have been there, he couldn't have done it. So alibi, if you believe the testimony as to his being elsewhere, is a perfectly good defense. That was called to my attention by counsel but I thought it was self-evident."

In holding that this charge constituted reversible error, the Third Circuit stated: (page 910)

> "In thus charging the jury the court omitted altogether the conception and rule that the accused has to do no more than to create in the minds of the jurors a substantial doubt concerning his whereabouts at the time in question. Indeed, the court may well have suggested to the jury that the accused bore the burden of persuasion on the alibi defense when it charged: '*If you believe the testimony as to his being elsewhere*, [that alibi] is a perfectly good defense.' (Italics added).
>
> "We are not persuaded by the government's argument that all of this was cured by a quite proper and forceful general instruction stating in clear language that throughout the case the burden remains on the government to convince the jury of guilt beyond reasonable doubt."

Similarly, here defense counsel requested an instruction that the Government must overcome beyond a reasonable

doubt the defense of an accident (JA 35-36). Such an instruction was not given. (JA 24-35). Instead, the trial court told the jury in substance that if it found the alleged assault was an accident without reckless conduct on the part of appellant, he should be acquitted. As the Third Circuit pointed out in the *Barrasso* case, this instruction omitted altogether the concept that appellant has to do no more than create a substantial doubt in the minds of the jurors and that the trial court's charge may well have suggested to the jury that the appellant bore the burden of persuasion on the accident defense when it charged "if you find" that an alleged assault was an accident without reckless conduct. (JA 29-34). Nor was this defect in the charge cured, as the Third Circuit pointed out, by a general instruction stating that the burden was on the Government to convince the jury of guilt beyond a reasonable doubt.

III

The Trial Court Committed Reversible Error in Not Granting Appellant's Motion for Judgment of Acquittal

At the close of the Government's case, the defense counsel made a motion for judgment of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. This motion read as follows: (JA 12-14)

> "MR. ROBERTSON: If Your Honor please, in the absence of this jury we would like to make a motion and argue.
>
> "THE COURT: You may. Give me the reasons. I don't know whether I will let you argue.
>
> "MR. ROBERTSON: If Your Honor please, the defendant moves for a judgment of acquittal on the following grounds:
>
> "It is incumbent upon the Government to prove every element of the offense charged. Here is an assault, and on our code we refer to common law definition of the assault and as part and parcel of the Government proof, the Government must negativate the accident.

"I think here the Government has failed to carry the burden of proof on that point. There has been no showing that this was not an accident. It is not incumbent upon the defendant to show it was.

"I think that the testimony of the complaining witness in which Your Honor will recall in regards to the question of whether or not she ever told the officer it was an accident—she was equivocal, evasive and did not give testimony which was clear and convincing and proving the point. I think that on that, if Your Honor please, that the defendant should not be required to put in a defense, that the Government must prove that this was not an accidental shooting. I think if you take the testimony of the complaining witness alone—

"THE COURT: I don't know what law you have to show that but it seems to me that is largely a matter for defense rather than for the determination of the jury.

"MR. ROBERTSON: Your Honor, may I cite on that—

"THE COURT: Yes, I would like the law.

"MR. ROBERTSON: American Jurisprudence, Volume IV.

"THE COURT: What would the jury have to do if the prosecution negativates the accident? Then it would be a purposeful assault with a deadly weapon, wouldn't it?

"MR. ROBERTSON: Yes; right, Your Honor.

"THE COURT: Precisely what would the function of the jury be? It's up to the jury to determine whether it was accidental or not.

"MR. ROBERTSON: The Government has put on no evidence to go to the jury on that point.

"THE COURT: How about the defense?

"MR. ROBERTSON: May I just read this, if Your Honor please?

"THE COURT: Yes. What Court is that?

"MR. ROBERTSON: This is American Jurisprudence. We have our Court of Appeals, which is my next citation.

"THE COURT: What Court is this? What are you reading from, please?

"MR. ROBERTSON: Volume IV, American Jurisprudence.

"THE COURT: Suppose you read the law that you say is the law of this district.

"MR. ROBERTSON: In the case of Nesan versus United States, the Court said this is construing the same broad provisions in the Municipal Court of Appeals.

"THE COURT: Municipal Court of Appeals?

"MR. ROBERTSON: That's right, Your Honor.

"THE COURT: Who wrote the opinion?

"MR. ROBERTSON: The opinion was written by Associate Judge Quinn.

"THE COURT: All right.

"MR. ROBERTSON: Judge Quinn says:

"'As we have said above, it is incumbent upon the prosecution to show that the act of the defendant was not accidental and that he had the necessary criminal intent.'

"I say on the evidence which has been put in today Your Honor, there has been no such showing that it was not accidental as the law required.

"So for that reason the defendant should be acquitted by virtue of Your Honor's directing the judgment of acquittal.

"THE COURT: What do you have to say, Mr. O'Malley?

"MR. O'MALLEY: Your Honor, the Government put in facts that they can show the general intent. The witnesses said he lined up a group of people he didn't like.

"THE COURT: That is clear. How about negativating an accident?

"MR. O'MALLEY: The positive testimony reverses negativating, Your Honor.

"THE COURT: Motion denied."

It is the position of appellant that the denial of his motion constituted reversible error and that he was entitled to a judgment of acquittal.

If there is a failure by the prosecution to prove an essential element of the alleged offense, a defendant is, of course, entitled to an acquittal. *McKenzie* v. *United States*, 266 F. 2d 524, 527 (10 Cir., 1959); *United States* v. *Gardner*, 171 F. 2d 753 (7th Cir., 1948). The standard to be applied in determining whether the prosecution has met this requirement was laid down by this Court in *Curley* v. *United*

States, 81 U.S. App. D.C. 389, 160 F. 2d 229 (1947), *cert. den.,* 331 U.S. 837 (1947) and repeated in *Cooper* v. *United States,* 94 U.S. App. D.C. 343, 218 F. 2d 39 (1954). The standard was set forth as follows in the *Curley* case: (160 F. 2d 232)

> "The true rule, threfore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted."

The elements of the alleged offense here involved were the performance of a necessary act by appellant and an unlawful intent. Appellant submits that the prosecution did not prove either element beyond a reasonable doubt.

The Government has contended that the act constituting the alleged assault by appellant was the brandishing of a loaded gun, which frightened the complainant.

The only testimony supporting this contention is that of the complainant who testified as follows: (JA 3)

> "Q. Now, did there come a time when something unusual happened? A. Well, at the party everyone was eating and drinking and dancing.
>
> "Q. Where did this take place; on what floor? A. The first floor.
>
> "Q. Did there come a time when you left the first floor? A. Yes, I left the first floor and went up to the ladies' room.
>
> "Q. All right. And how long did you remain upstairs, if you recall? A. Oh, about five minutes or more.
>
> "Q. Did there come a time when you returned to the first floor? A. Yes, it did.

"Q. And on returning to the first floor did you notice anything unusual? A. Well, I noticed every one was standing in the hallway and Raymond Dean was standing in the front of the door and he had a gun in his hand.

"Q. All right. What happened then? A. Well, I was so stunned when I came down the steps I just stood right in front of the crowd, right in front of everybody, and I couldn't move, and he had the gun, flashing the gun.

"Q. You say you couldn't move. What prevented you from moving? A. I was frightened."

On cross-examination complainant testified as follows: (JA 5)

"Q. Now, you say you know Mr. Dean? A. Yes, I do.

"Q. How long have you known him? A. Oh, approximately—about five or six months. We worked together.

"Q. I see. Did you ever have any argument with him whatsoever? A. No; never.

"Q. You and he get along friendly? A. Yes.

"Q. Did you ever have any animosity or any feelings of dislike for him? A. No.

"Q. Did he towards you? A. No, not that I know of."

The substance of this testimony is that complainant, on coming down the stairs to the hall saw appellant, with whom she was on friendly terms and who had never displayed any animosity towards her, standing by the door with a gun in his hand, that a crowd of other people were in the hall, and that she was frightened and stood in front of the crowd. It is submitted that such testimony, which was not even supported by Government witness King, the only other witness who could see the hall at the time (JA 7-10), does not make out, beyond the required reasonable doubt, the performance of or act of assault with a dangerous weapon by appellant against complainant, as contended by the Government.

First: Appellant is not shown by this testimony to be pointing the gun in question at anybody, much less complainant. All that complainant says is that he was "flashing" the gun, whatever this may mean. Webster's Dictionary defines the word "flashing" as meaning, *inter alia*, "to display, esp. in a showy manner." Thus all that complainant's testimony with respect to appellant's alleged act amounted to was that while coming down the stairs she saw him standing by the door displaying a gun and that she stood in front of the crowd in the hall. Appellant has not found any case holding that such an act is the performance required for an assault. There is no testimony to the effect that appellant was pointing the gun at anybody when complainant first saw him as she came down the stairs. No one else in the alleged crowd in the hall filed a complaint against appellant. Nor is there any testimony to show that appellant saw complainant or knew she was present. If in fact the gun was pointing at complainant, it was not because appellant deliberately pointed it at her, but because complainant deliberately placed herself in such position.

Second: Complainant testified she was frightened and couldn't move. This purely subjective claim of fright, necessary to technically make out an act of assault, was only stated as the result of a suggestive question by Government counsel (JA 3) and is refuted by complainant's testimony as to the objective facts (a) that she moved through the crowd in the hall and placed herself in front of such crowd, and (b) there was no animosity between her and appellant. Her actions under such circumstances are more consistent with a conclusion that, seeing a friend of hers displaying a gun in front of a crowd in the hall, as she came down the stairs and, out of curiosity she pushed through the crowd to see what was going on, than they are with a conclusion that she did so out of fright. In addition, her testimony that she was frightened and couldn't move is refuted by the fact that she not only moved by pushing

to the front at the beginning, but she obviously then turned away because her wound was in buttocks (JA 11), indicating very clearly that she was turning away or already had turned away.

The Government's case on unlawful intent by appellant was even more tenuous and doubtful. Even if we assume *arguendo*, that appellant's "flashing" of a gun was a sufficient performance to support the alleged offense, there still must be proved an unlawful intent. The applicable rule has been clearly stated as follows, in *State* v. *Kuum*, 55 Mont. 436, 445, 178 P. 288, 291 (Sup. Ct. Mont., 1919)

> "If one person presents a loaded firearm at another, with a purpose to do the other an injury or put him in fear, he is guilty of doing an unlawful act, for it amounts to an assault. State v. Barry, 45 Mont. 598, 124 P. 775, 41 L.R.A. N.S. 181; State v. Papp, 51 Mont. 405, 153 P. 279.
>
> "But if the pointing of the weapon is accidental, or if there is no purpose or intention to injure the other by putting him in fear or otherwise, the act is not unlawful, in the sense that it is a crime punishable by law."

This rule was restated in *State* v. *Storm*, 220 P. 2d 674, (Sup. Ct. Mont., 1950), citing the *Kuum* case. Appellant submits that the Government produced no testimony showing that appellant had a purpose or intention to injure either complainant or anyone else.

There was no testimony to the effect that appellant threatened complainant or anyone else while he had the gun in his hand or at any other time or threatened to shoot anyone. The only testimony offered by the Government, which could be said to go to appellant's intent was that of complainant and Mrs. King.

Complainant's testimony, which could be said to relate to appellant's intent is found at JA 3-6.

At JA 3-4, complainant testified as follows when asked what happened after she returned to the first floor hallway:

"Q. All right. What happened then? A. Well, he was cursing and swearing. He said he didn't like any —and he was calling names. He said he didn't like the people that was there and nobody better not move or say anything.

"Q. You say he called names. Did he call more than one name to persons he didn't like? A. No, he were calling provoking language.

"Q. Do you recall whether he was directing that vulgar language to anybody in particular or just at the people generally? A. At the people generally, no one in particular."

On cross-examination, complainant testified (JA 5) that she and appellant were friendly and that he had no animosity toward her. (See page 36 above.)

Also at JA 5, complainant at first testified that appellant's statements were directed to the "Aristo bunch," and then contradicted herself. This testimony reads as follows:

"Q. Yes. Now, is it your testimony that he was saying that he didn't like anybody at the party? A. Yes, that's what he was saying. He was speaking of the Aristo bunch that he worked with.

"Q. Did he say that? A. No."

Finally, on cross-examination, complainant at first testified that she couldn't remember whether she told the investigating officer that the incident was an accident and then later testified that she told him "I didn't know because he didn't have any reason to shoot me." This testimony reads as follows: (JA 5, 6)

"Q. Do you recall talking to an Officer Washington, a tall nice-looking officer? A. Yes, I do.

"Q. Now, do you recall—is it not a fact you told him it was accidental? A. I don't remember telling him it was accidental.

"Q. Well, now— A. He asked me was it accidental.

"Q. How's that?

"THE COURT: He asked her if it was accidental, she said.

"By MR. ROBERTSON:

"Q. And what did you say to that, Miss Alston? A. I can't recall just offhand.

"Q. You can't recall what you told him? A. No.

* * * * *

"Q. Well, do you recall whether or not he asked you if it was accidental? A. I don't recall whether it was on that occasion or not, but I know he asked me did I think it was accidental.

"Q. Are you able to tell us what your reply to that question was?"

* * * * *

"By MR. ROBERTSON:

"Q. Are you able to recall and tell us what your answer to that question was?

"THE COURT: Do you remember, in other words, what your answer was?

"THE WITNESS: To which question?

"THE COURT: Whether you thought it was an accident.

"THE WITNESS: I told him I didn't know because he didn't have any reason to shoot me. We had never had an argument or anything. I was nothing to him, and we had worked together all the time and got along together."

Mrs. King, the other Government witness to testify to the circumstances surrounding the incident contradicted complainant's testimony that appellant did any cursing or used vulgar language. She also testified that she saw nothing unusual about appellant. This testimony reads as follows: (JA 8, 9)

"By MR. O'MALLEY:

"Q. Now when Dean was making these statements did you notice anything else unusual about it? A. No, I didn't, because I didn't pay him any attention.

* * * * *

"CROSS EXAMINATION

"By MR. ROBERTSON:

* * * * *

"Q. And it was your testimony that you didn't see anything unusual about the Defendant Dean when you heard him saying that he didn't like the Aristo people? A. Well, no; he always looked the same to me.

"Q. Was he cussing? A. No, he wasn't.

"Q. Was he using vulgar language? A. No, he was not."

Appellant submits that this testimony does not make out beyond a reasonable doubt an intention by appellant to injure complainant or anyone else by putting him or her in fear or otherwise.

It certainly does not show a deliberate intent by appellant to injure or threaten complainant because by her statement it was not directed to her. (JA 4) Nor does it show an intent to injure anyone else, even if the testimony of Mrs. King is not considered. At most there is then a situation in which appellant cursed and said that he didn't like the "people generally." However, this was not accompanied by any threat to shoot complainant or anyone else so as to make out a specific intent to injure.

In addition, the Government's own testimony—in the statements of Mrs. King—negated the fact that appellant cursed, used vulgar language, or did anything "unusual." The Government vouched for the credibility of Mrs. King, *Bowles* v. *Marx Hide & Tallow Co.*, 153 F. 2d 146, 147 (6th Cir., 1946) and cannot challenge its own unimpeached witness. *Burdon* v. *Wood*, 142 F. 2d 303, 306 (7th Cir., 1944).

The Government has consistently recognized the defects in the testimony insofar as it relates to a specific intent by appellant to injure anybody. It has therefore relied on a general intent growing out of alleged reckless and wanton conduct. On this point, however, the record amounts to no more than a showing that appellant had a gun in his hand

and somebody was shot. It is submitted that this does not make out beyond a reasonable doubt recklessness showing a wanton disregard for the safety of others.

In particular, the evidence does not establish beyond a reasonable doubt that the shooting was not accidental as appellant claims. Complainant testified that she had told the investigating officer that she didn't know whether it was an accident "because he didn't have any reason to shoot me. We had never had an argument or anything." (JA 6) Moreover, the mere display or handling of a loaded gun, which discharges and wounds another, does not in and of itself establish a reckless disregard for others. *Duff* v. *United States*, 171 F. 2d 846 (4th Cir., 1949). The Government was required to prove more.

CONCLUSION

Upon the basis of the foregoing points and authorities, appellant submits that:

1. The Court should find that he was entitled to a judgment of acquittal and direct the District Court enter such judgment.

2. The Court should find that the District Court committed reversible error with respect to (a) its charge to the jury on the credibility of witnesses; and/or (b) its charge to the jury concerning appellant's defense of an accident by its failure to include therein instructions to the effect that the burden of proving beyond a reasonable doubt that the shooting of complainant was not an accident rested on the Government.

Respectfully submitted,

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(Appointed by this Court)

October 29, 1962

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17214

RAYMOND DEAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
MAX FRESCOLN,
Assistant United States Attorneys.

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 5 1962

Joseph W. Stewart

CLERK

QUESTIONS PRESENTED

In a case where appellant was charged with Assault with a Dangerous Weapon, and where the evidence showed that appellant had flashed a gun and said to a group of people in a hallway, "[N]obody better not move or say anything," which frightened the complainant, that the gun fired and wounded the complainant, and that appellant fled,

(1) Was it error for the judge, in instructing the jury on the credibility of witnesses, to say that a discrepancy between the testimony of the complainant and of another witness as to the means of transportation the complainant had to the party was not a material fact?

(2) Was not the judge's instruction on burden of proof proper when the jury was instructed they must find the appellant guilty of each and every element of the offense, and that the criminal intent could be inferred from gross negligence in handling the gun?

(3) Was the judge not correct when he denied the motions for acquittal?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17214

RAYMOND DEAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed October 5, 1959, charged appellant with Assault with a Dangerous Weapon. A jury convicted him, and by Judgment and Commitment filed January 11, 1960, he was sentenced to 3 to 9 years imprisonment. His trial counsel advised him, by letter dated January 14, 1960, that they were available to prosecute an appeal if he wished. Appellant filed in the District Court a *pro se* Affidavit in support of Application for Leave to Appeal In Forma Pauperis on January 20, 1960. Its denial was filed January 22, 1960, and a letter, dated January 23, 1960, addressed to appellant at the District of Columbia Jail, advised appellant that the application for leave to appeal was denied. On October 13, 1960, appellant filed in the District Court his Motion of Defendant to Vacate Judgment and Set Aside Illegal Sentence Pursuant to 28 U.S.C. 2255. (J.A. 37.) Its denial, dated October 17, 1960, was filed February 23, 1961. (J.A. 40.) Ap-

pellant filed his Motion to Proceed In Forma Pauperis on March 15, 1961. Its denial was filed March 22, 1961. By Order of July 20, 1962, this Court allowed this appeal.

Appellant's conviction for Assault with a Dangerous Weapon is based principally on the testimony of the complaining witness, Sallie B. Alston. She testified that on the evening of April 12, 1958, she was at a party in the District of Columbia. While "everyone was eating and drinking and dancing," she went up to the ladies' room, stayed there about five minutes and returned to the first floor. "I noticed everyone was standing in the hallway and Raymond Dean [appellant] was standing in the front of the door and he had a gun in his hand * * * Well, I was so stunned when I came down the steps, I just stood right in front of the crowd, right in front of everybody, and I couldn't move, and he had the gun, flashing the gun. * * * I was frightened. * * * Well, he was cursing and swearing. He said he didn't like any — and he was calling names. He said he didn't like the people that was there and nobody better not move or say anything. * * * Well, I recall I looked and he had this gun. The gun went off and he shot me in the hip. * * * On the right hip." (J.A. 3–4). The hospital records of Sallie Alston showed she was admitted April 30th, 1958, for a gunshot wound. (J.A. 11.)

Phala King testified she saw Sallie go upstairs (J.A. 7), and during that time "I was sitting in the dining room and Dean was at the door, and he made a statement that he didn't like none of the Negroes that worked at Aristo Cleaners * * * Then Sallie came down the steps. She ran in the dining room and said she was shot." (J.A. 7.) When she left the premises appellant "and his wife were running toward 13th Street, Northeast." (J.A. 9.)

The police officer investigating the case testified he did not find appellant at the address of the party. Ultimately it was learned that appellant had fled the jurisdiction. (J.A. 12.)

Witnesses for the appellant did not see the shooting incident or the events leading to it described by the complainant. (J.A. 16, 18, 21.) Appellant's aunt testified: "No, I didn't hear anything because Miss Alston ran to me and said, 'Mabel, I'm shot.' I said, 'No, Miss Alston, you can't be.' * * * I

didn't know who it was [who shot the complainant]. Everybody in the hall said Dean. I said it can't be Dean. * * * Well, Miss Alston was going out the door to the doctor. Somebody said Dean shot her, and I said 'Can't be!'" (J.A. 16.) Another defense witness testified "I heard the noise. * * * Sounded like you drop a cherry bomb; make a bop noise. I thought it was me at first. I * * * walked up to the top of the steps. I heard the lady say she was shot. Scared me. I saw my cousin going out the door and they said it was him." (J.A. 18.)

STATUTES AND RULES INVOLVED

Title 22, District of Columbia Code, Section 502 provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 28, United States Code, Section 2255, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Rule 29(a), Federal Rules of Criminal Procedure, provides:

> (a) *Motion for Judgment of Acquittal.*—Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the

evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 37(a) (1) and (2), Federal Rules of Criminal Procedure, provides:

(a) Taking Appeal to a Court of Appeals.

(1) *Notice of Appeal.*—An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure to do so does not affect the validity of the appeal.

(2) *Time for Taking Appeal.*—An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial

imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Rule 39 (a) and (c), Federal Rules of Criminal Procedure, provides:

(a) *Supervision in Appellate Court.*—The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

(c) *Docketing of Appeal and Record on Appeal.*—The record on appeal shall be filed with the appellate court and the proceeding there docketed within 40 days from the date the notice of appeal is filed in the district court, but if more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date the first notice of appeal is filed. In all cases the district court or the appellate court or, if the appellate court is not in session, any judge thereof may for cause shown extend the time for filing and docketing.

Rule 45(b), Federal Rules of Criminal Procedure, provides:

(b) *Enlargement.*—When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the ex-

piration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

Rule 52(a), Federal Rules of Criminal Procedure, provides:

(a) *Harmless Error.*—Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

SUMMARY OF ARGUMENT

The proper scope of review in this appeal is the review allowed under 28 U.S.C. 2255. Appellant never perfected his appeal from the conviction. He filed a request for leave to appeal which could be a timely notice of appeal, but he was advised that leave to appeal was denied. He has not shown excusable neglect in not docketing the appeal in compliance with Rule 39(c), Federal Rules of Criminal Procedure, nor in not moving for enlargement of time under Rule 45(b), Federal Rules of Criminal Procedure. Nor has he shown that there is serious error meriting this Court's using its supervisory authority under Rule 39(a), Federal Rules of Criminal Procedure, and allowing a full review of the case on the merits. The error appellant claims is not cognizable under 28 U.S.C. 2255.

The discrepancy between the testimony of the complaining witness and of another witness as to how the complainant arrived at the party was not material to any issues in the case. Therefore, the judge's statement in his charge to the jury on the credibility of witnesses, that the testimonial discrepancy was not a material fact, did not prejudice appellant. Thus, the judge's statement, if not permissible comment when read as part of the whole instruction, was harmless error.

The reasonable doubt instruction adequately explained to the jury that in order to convict, they must find appellant guilty of each and every element of the offense, including the

criminal intent, which could be inferred from gross negligence in handling the firearm.

The evidence that appellant had flashed a gun, saying "[N]obody better not move or say anthing * * *", frightening the complainant, and that the gun discharged wounding the complainant, was sufficient evidence for the judge to submit the case to the jury in appellant's trial for Assault with a Dangerous Weapon. The trial judge properly denied the motions for acquittal.

ARGUMENT

I. The proper scope of review is that for petitions under 28 U.S.C. 2255, under which none of the claims of error are cognizable

By Judgment and Commitment filed January 11, 1960, appellant was sentenced to a term of imprisonment of three to nine years for Assault With a Dangerous Weapon (22 D.C.C. 502). On January 20, 1960, he filed *pro se* an Affidavit in Support of Application for Leave to Appeal *In Forma Pauperis*, which was denied January 22, 1960. There was no appeal taken to this court from the denial of that motion despite notification of the denial by letter dated January 23, 1960.

This appeal is from an order denying relief in a proceeding under Title 28, Section 2255, United States Code. On October 13, 1960, appellant filed in the District Court for the District of Columbia his Motion to Vacate Judgment and Set Aside Illegal Sentence Pursuant to 28 U.S.C. 2255. (J.A. 37.) From the denial of that motion, filed February 23, 1961 (J.A. 40), appellant on March 15, 1961, moved to proceed on appeal *in forma pauperis*. Following the denial of that motion, on March 22, 1961, he appealed to this Court. Appellant filed a petition in this Court for leave to prosecute an appeal without prepayment of costs, May 2, 1961. By the following order in Misc. 1644, filed July 19, 1962, this Court granted appellant's petition for leave to prosecute appeal without prepayment of costs:

> On consideration of petitioner's petition for leave to prosecute appeal without prepayment of costs, and responsive pleadings, it is

> ORDERED by the court that petitioner be, and he is hereby, allowed to prosecute an appeal without prepayment of costs, and that the joint appendix of the parties shall be prepared at the expense of the United States.

The motion of appellant for leave to perfect an appeal and for reproduction of transcript, filed in Misc. 1644 after the initial petition of May 2, 1961, was denied without prejudice by Order of this Court filed February 12, 1962. In that Order this Court ordered that a supplemental memorandum should be filed "with respect to any non-frivolous issues which could be raised upon an appeal. * * *" There was no new motion to perfect an appeal.

Under Rules 37, 39, and 45 of the Federal Rules of Criminal Procedure this Court could have jurisdiction of a full appeal on the merits in this case. Appellant filed *pro se* an Affidavit in Support of Application for Leave to Appeal In Forma Pauperis, within the ten day period required by Rule 37(a)(2). Such an indication of an intention to appeal could constitute the requisite Notice of Appeal. *Belton* v. *United States,* 104 U.S. App. D.C. 81, 85, 259 F. 2d 811, 815 (1958); *Blunt* v. *United States,* 100 U.S. App. D.C. 266, 270, 244 F. 2d 355, 359 (1957). Rule 39(c) allows for extending the 40 days allowed for docketing the appeal following the filing of the notice of appeal when cause is shown, and Rule 45(b)(2) allows enlargement of time on a showing of excusable neglect.

As the case stands before this Court, however, the appeal is from the denial of the 28 U.S.C. 2255 petition, and there is nothing to show excusable neglect to allow an enlargement of this appeal into a full appeal on the merits. *Christoffel* v. *United States,* 88 U.S. App. D.C. 1, 6, 190 F. 2d 585, 590 (1950) explains how this Court can consider an appeal such as this a full appeal under Rule 39(a). There the Court rejected the claim that the delay was due to excusable neglect within the meaning of Rule 45(b)(2), but concluded that Rule 39(a) of the Federal Rules of Criminal Procedure vests this Court "with discretion to consider and determine questions on appeal notwithstanding failure of counsel to make due compliance with the usual procedural requirements." This principle ap-

plies, as in *Belton* v. *United States, supra,* 86, and *Blunt* v. *United States, supra,* 272, when there are substantial questions as to the lawfulness of the conviction. *Christoffel* v. *United States, supra,* 10.

The issues appellant has raised in his Section 2255 petition do not raise a substantial question as to the lawfulness of the conviction. In *Belton* v. *United States, supra,* 86, this Court recognized that "the administration of criminal justice by appellate as well as other courts must be within the law which includes those rules of procedure that are binding * * *," and observed in conclusion that "it is never too late to rectify serious error." The converse should follow; and if there is no substantial question as to the lawfulness of the conviction, or no serious error, the scope of review in this appeal must be limited to matters that are cognizable under 28 U.S.C. 2255.

On their merits, appellant's claims of error lack substance. The record shows appellant was properly convicted of the crime of Assault With a Dangerous Weapon, and that such discrepancies as there may have been at trial were harmless. Thus, there is no substantial question as to the lawfulness of appellant's conviction calling for the special exercise of this Courts supervisory authority under Rule 39(a), Federal Rules of Criminal Procedure.

The matters from the Section 2255 petition retained by appellant in this appeal are not cognizable under 28 U.S.C. 2255, so there is no grounds for reversal. The question of whether judgment of acquittal should have been granted at the conclusion of the government's case goes to the sufficiency of the evidence, a non-cognizable matter. *Upshaw* v. *United States,* 102 U.S. App. D.C. 299, 252 F. 2d 863 (1958), cert. denied, 357 U.S. 939; *White* v. *United States,* 98 U.S. App. D.C. 274, 235 F. 2d 221 (1956); *Adams* v. *United States,* 95 U.S. App. D.C. 354, 222 F. 2d 45 (1955). The claims that the trial judge gave improper instructions to the jury on the matter of credibility of witnesses and burden of proof are not cognizable. *Adams* v. *United States, supra; Hastings* v. *United States,* 184 F. 2d 939 (9th Cir. 1950).

II. Considered on their merits, appellant's claims of error lack substance and do not raise a substantial question as to the lawfulness of his conviction

A. The judge's instruction on the credibility of witnesses was proper

A discrepancy existed in the trial testimony of the complainant and of another witness as to the complainant's means of transportation to the party. (J.A. 5, 7, 9.) The judge, while instructing the jury on the credibility of witnesses (J.A. 25–26), said that the discrepancy "was not a material fact" (J.A. 26).[1] That statement did not prejudice appellant, and was merely comment akin to the judge's power to rule on the relevance and admissibility of evidence.

Appellant has not shown how the testimonial discrepancy was a material fact. The issue to be resolved in the case was whether appellant had made an assault on the complainant with a dangerous weapon. In closing argument at trial, counsel said the discrepancy was "a material matter about which she [complainant] could not have been mistaken" but offered nothing in explanation. On appeal, appellant's adoption of language from a Fifth Circuit case involving the question of what "material" means for the purposes of a perjury indictment does not explain how the matter was material to the questions raised under the indictment and at trial. The trial record shows this testimonial discrepancy was immaterial.

Appellant's failure to show materiality of the discrepancy indicates that the jury would not have found the witness "wilfully testified falsely as to any material fact" (J.A. 26), so appellant was not prejudiced by the statement.[2] Thus, if

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[1] Appellant objected to the charge regarding materiality. (J.A. 32.)

[2] Appellant's failure to show materiality disposes of the question of whether the trial judge erred in telling the jury, in effect, that it was up to them whether or not to disregard a witness' testmony if they found he had wilfully testified falsely as to a material fact (J.A. 26). Even if the discrepancy were somehow material, appellant did not preserve this matter by objection. The only matters appellant objected to in the charge intended to cover the requested instruction Number 2, (J.A. 36), was the "Characterization of the testimony of the witness as not being on material fact." (J.A. 32.) Furthermore, *Norfolk & Western Ry. Co.* v. *McKenzie*, 116 F.2d 632, 635, (6th Cir., 1941), quoted at length by appellant, points out that the maxim *falsus in uno, falsus in omnibus* "is one of permission and not mandatory."

there was error at all it was the harmless error, encompassed in Rule 52(a), Federal Rules of Criminal Procedure.

Considering the manner in which the discrepancy developed during the testimony of two Government witnesses, it is not surprising that the trial judge mistakenly remarked that appellant's trial counsel had said the discrepancy of the testimony was immaterial (J.A. 26). Such a mistake could not have prejudiced the appellant, and would be no more than harmless error. Rule 52(a), Federal Rules of Criminal Procedure. The discrepancy was, in fact, immaterial. Moreover, the jury was aware there had been a misstatement, for they heard appellant's closing argument, (J.A. 23) and the Government's rebuttal argument, where counsel for the Government countered what appellant's counsel had said regarding materiality (J.A. 23). The judge also told the jury that "The argument of the lawyers in this case are entitled to your careful consideration insofar as you find them logical and reasonable." (J.A. 28.)

Even if the discrepancy had been a material fact, the judge's remark that it was not material, is properly construed as permissible comment. It is well settled that a judge may comment on evidence to assist the jury. *Simmons* v. *United States*, 142 U.S. 148 (1891); *Beck* v. *United States*, 78 U.S. App. D.C. 10, 140 F. 2d 169 (1943); *Wilson* v. *United States*, 71 U.S. App. D.C. 54, 107 F. 2d 253 (1939). In *Beck*, *supra*, the trial judge commented on appellant's credibility, and also took issue with part of the closing argument of appellant's counsel which attacked the honesty of the testimony of two of the Government witnesses and characterized one of the witnesses as a busybody. The judge did not commit error by telling the jury that performing one's duty to report a crime, if one occurred, is not meddling. In *Wilson*, *supra*, there was a clear discrepancy in the testimony of the complaining witness in two different trials on the issue of whether he could remember the location of the robbery site. The trial judge was not in error when he commented that in his opinion the rule of false testimony as affecting credibility did not apply in the case, but that he was giving it on appellant's request for the jury to apply if it so wished. In context the judge's com-

ment in the instant case went no further than in *Beck* and *Wilson*, *supra*. Indeed, the Court told the jury, immediately after the instruction on credibility, that:

> You are not to permit yourself to be influenced by anything the Court has said or done which has suggested to you that he is inclined to favor the position of either the Government or the defendant. I have not intended to express nor to intimate any opinion as to what witnesses are worthy of belief or disbelief, what facts are established, what facts have not been established, or what inferences may be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I earnestly instruct you to disregard it. (J.A. 26.)

The charge to the jury must be considered as a whole. *Kinard* v. *United States*, 69 App. D.C. 322, 323, 101 F. 2d 246, 247 (1938); *Askins* v. *United States*, 97 U.S. App. D.C. 407, 412, 231 F. 2d 741, 746 (1956), cert. denied, 351 U.S. 989. This charge as a whole did not mislead the jury, but told them they were "the sole judges of the credibility of witness." (J.A. 25.)

B. The judge's instructions on burden of proof were proper

The judge's charge to the jury on reasonable doubt and on the elements of the crime of Assault with a Dangerous Weapon made clear that the Government had to prove each and every element of the offense, in order to convict the defendant.[3] In instructing the jury on reasonable doubt the court said:

> Every defendant in a criminal case is presumed to be innocent and that presumption attaches to the defendant throughout the trial. The burden of proof, as has been stated to you, is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains that burden and proves beyond a reasonable doubt that the defendant has committed every element of the crime with which he is charged, the jury must find the defendant not guilty. (J.A. 25.)

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[3] Appellant objected to the charge on burden of proof. (J.A. 31. See J.A. 36.)

The judge then explained what the term "reasonable doubt" meant. (J.A. 25.) After instructing on the credibility of witnesses (J.A. 25–26), he told the jury:

> The Court instructs you that if there is a conflict in the evidence of this case on any fact or circumstance tending to establish either the guilt or innocence of the defendant, a part of which is in favor of the theory of the Government and a part of which is in favor of the theory of the defendant, and you should entertain a reasonable doubt as to which is true, then it is your duty in arriving at your verdict to adopt the evidence on the theory or conclusion which is most favorable to the defendant. (J.A. 26–27.)

The court then defined direct and circumstantial evidence and several other brief matters before coming to the law applicable to the case. (J.A. 27–28.) He first instructed the jury:

> The defendant claims that the discharge of the pistol relating to the complaining witness, Sallie B. Alston, was an accident.
>
> An accident is defined as the happening of an event without the concurrence of the will of the person by whose agency it is caused.
>
> If a person negligently handles a firearm and as a result of his negligence the firearm is discharged and the bullet hits another human being, such a person is guilty of assault with a dangerous weapon. It is not necessary that such person should have an intent to hit anyone or even that he should have intent to fire the firearm.
>
> In order, however, that such person may be guilty of a crime, his negligence must be more than just a failure to exercise ordinary care, but his conduct must be reckless, showing a wanton disregard for the safety of others.
>
> If the jury finds the defendant's conduct in the handling of the firearm to be grossly negligent, reckless and wanton, showing an utter disregard for the safety of others, the jury should find a verdict of guilty.

> On the other hand, if the jury finds that the firearm was discharged accidentally without any negligence on the part of the defendant or that even if the defendant was negligent it was ordinary carelessness and did not amount to gross negligence, and to recklessness and wanton conduct, the jury should find the defendant not guilty.

The court then charged as to the elements of the offense of Assault With a Dangerous Weapons (J.A. 29–30) and, after defining the offense, said:

> If you find that the defendant committed an assault upon the complaining witness with the definition of assault as I have described it to you, with a pistol, that would come within the definition of the statute of an assault with a dangerous weapon.

The charge to the jury must be considered as a whole. *Kinard* v. *United States, supra, Askins* v. *United States, supra.* The judge made this clear when he said to the jury:

> In considering the instructions that I have given you, you are to consider them in their entirety, that is, as a whole. You are not to pick out some particular instruction and accentuate that to the overlooking of others. (J.A. 32.)

A reading of the whole charge in appellant's trial shows the jury was aware that each and every element of the offense had to be proved beyond a reasonable doubt. If the jury believed all the complainant's testimony, including that appellant said, "nobody better not move," (J.A. 4), the question of an accidental discharge of the firearm could not have arisen; and the fact that complainant was shot, would only corroborate her testimony that appellant was "flashing the gun" (J.A. 3). But if the jury found the assault only from the physical wounding, the explanation of the defense of accident, never raised by the evidence [4], was adequate. From it the jury had to under-

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[4] Appellant did not testify at the trial. The complainant, after testifying (J.A. 3–4) she was frightened by appellant's waving a gun and saying, "nobody better move or say anything," said that when asked by the police officer whether it was an accidental shooting, she told him: "I didn't know

stand that though gross negligence in handling a firearm could be the basis of the requisite criminal intent, they must acquit appellant unless they found, beyond a reasonable doubt, that he had handled the gun in a grossly negligent way.

C. The trial court correctly denied appellant's motion for judgment of acquittal

At the conclusion of the Government's case, there was ample evidence from which the jury could conclude that appellant was guilty of Assault with a Dangerous Weapon.[5] The complainant, Sallie Alston, testified (J.A. 3–4) that at a party when "everyone was eating and drinking and dancing" she "left the first floor and went up to the ladies room"; that when she returned to the first floor, she "noticed everyone was standing in the hallway and Raymond Dean was standing in the front of the door and he had a gun in his hand." She continued: "Well, I was so stunned when I came down the steps I just stood right in front of the crowd, right in front of everybody, and I couldn't move, and he had the gun, flashing the gun. * * * I was frightened. * * * he was cursing and swearing. He said he didn't like any—and he was calling names. He said he didn't like the people that was there and nobody better not move or say anything." Then she testified "[t]he gun went off and he shot me in the hip." (J.A. 3–4.) She told a friend she was shot (J.A. 7). That friend heard appellant say he did not like the people he worked with (J.A. 7). Hospital records showed that the complainant was admitted for a gun shot wound (J.A. 11). Appellant was seen running from the scene (J.A. 9), and fled the jurisdiction (J.A. 12).

That testimony was sufficient for a jury to find that appellant had committed an Assault With a Dangerous Weapon on the complainant. When a person holds a gun and warns everyone in a group that he does not like them, and that

---

because he didn't have any reason to shoot me." (J.A. 6.) One defense witness characterized the shooting as "the accident," (J.A. 17), but when asked on cross-examination whether he had "anything to base that on, anything that you saw * * *?", he answered, "Well, I'd say no, that way." (J.A. 20.)

[5] Appellant moved for an acquittal at the close of the Government's case, and again at the close of the trial. (J.A. 12, 21.)

"nobody better not move or say anything," logically he is assaulting every single person in that group.

Under such circumstances it was not necessary that the Government prove beyond a reasonable doubt that the assault was an accident. The statement of warning by appellant, obviously calculated to put people in fear, showed that the pointing of the gun was not accidental, and not without intent to injure or put in fear. An accidental wounding during an intentional assault is not a defense. *State* v. *Cuccinello*, 133 A. 2d 889, 152 Me 431 (1957). The fact appellant instilled fear in the complainant, completed the assault, just as an attempt to pistol whip a person can be, nevertheless, Assault With a Dangerous Weapon, although there is no injury. *McGill* v. *United States*, 106 U.S. App. D.C. 136, 138, 270 F. 2d 329, 331 (1959), cert. denied 362 U.S. 905.

The testimony of appellant's witnesses did not contradict the testimony of the complainant as to the words appellant said, or the fact that she was frightened. Appellant's aunt, when asked on cross-examination, "Did you determine who attempted to shoot her?" said, "I didn't know who it was. Everybody in the hall said Dean. I said it can't be Dean.... Miss Alston was going out the door to the doctor. Somebody said Dean shot her, and I said, 'Can't be.'" (J.A. 16.) Another defense witness testified on direct examination that he "didn't see the shooting," and "I heard the lady say she was shot. Scared me. I saw my cousin going out the door and they said it was him." (J.A. 18.) At the conclusion of the defense evidence the Government's case was, if anything, stronger because of those remarks of defense witnesses.

Certainly the entire record shows the trial judge had to deny appellant's motions for judgment of acquittal.

> [A] trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232 (1947), cert. denied, 331 U.S. 837.

If the judge so determines, a case must be submitted to the jury. *Curley* v. *United States, supra.* The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *Morton* v. *United States,* 79 U.S. App. D.C. 329, 147 F. 2d 28 (1945), cert. denied, 324 U.S. 875. This was a proper case for the jury.

CONCLUSION

Wherefore, it is submitted the judgment of the District Court be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 17,214

RAYMOND DEAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the United States District Court for the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 7 1962

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CLERK

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December, 1962

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,214

RAYMOND DEAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

REPLY BRIEF FOR APPELLANT

The appellant files this brief in reply to the brief of the appellee, United States, pursuant to Rule 18(c) of the Court's Rules.

I

This Court Should Review the Validity of the Conviction of the Appellant in the District Court and Not Confine Itself to a Review Limited to that Accorded Petitions Under 28 U.S.C. 2255

The Government in its answering brief (Point I, Government Br., pages 7-9) contends that the proper scope of review in this case is that for petitions under 28 U.S.C. 2255, under which none of the claims of error advanced by appellant are cognizable.

This contention is premised upon an argument that the present appeal is from an order of the District Court denying relief in a proceeding under Title 28, Section 2255 of the United States Code. The

Government concedes (Government Br., page 8) that under Rules 37, 39, and 45 of the Federal Rules of Criminal Procedure this Court could have jurisdiction over a full appeal on the merits of this case. The reason for this concession is that the Government concedes that appellant filed a timely application with the District Court for leave to appeal In Forma Pauperis, and that under Rule 45(b)(2) the time for perfecting appellant's appeal from his original conviction could have been extended on a showing of excusable neglect. However, the Government argues that as the case stands before this Court the appeal is solely from a denial by the District Court of appellant's 28 U.S.C. 2255 petition, because the motion of appellant for leave to perfect an appeal from his original conviction filed on December 28, 1961 (misc. Case No. 1644) was denied without prejudice by the order of this Court, dated February 12, 1962 and that there has been no new motion by appellant to perfect an appeal.

The basic premise of the Government's contention that this Court's order of February 12, 1962, denied appellant's motion of December 28, 1961 to perfect an appeal from his original conviction and proceed without prepayment of costs is in error. This Court's Per Curiam order of February 12, 1962 read as follows:

> "Upon consideration of the petitioner's motion for leave to perfect an appeal and proceed without prepayment of costs and for reproduction at the expense of the Government of the stenographic transcript of the trial, of petitioner's supplemental memorandum, of respondent's opposition and of petitioner's reply it is
>
> ORDERED by the court that insofar as petitioner moves for reproduction of the stenographic transcript at the expense of the United States said motion is denied without prejudice. Whitt v. United States, 104 U. S. App. D. C. 1, 259 F.2d 158.

> It is FURTHER ORDERED by the court that petitioner's counsel is directed to file a further supplemental memorandum with respect to any non-frivolous issues which could be raised upon an appeal and further develop petitioner's allegations of error."

It is clear that the only portion of appellant's motion upon which this Court acted in its order of February 12, 1962 quoted above was the request for a reproduction of the stenographic transcript of appellant's trial at the expense of the United States. This portion of the motion was denied without prejudice. The appellant's motion for leave to perfect an original appeal from his original conviction and proceed without prepayment of costs remained pending before this Court.

On April 26, 1962 this Court entered a Per Curiam order allowing appellant to proceed in forma pauperis to the extent of having the stenographic transcript of his trial before the District Court prepared at the expense of the United States and allowing additional time for appellant after such preparation to file an additional memorandum.

Under these circumstances appellant interpreted this Court's order of July 19, 1962, in Misc. Case No. 1644, allowing appellant to prosecute an appeal without prepayment of costs, as permitting him to prosecute such an appeal from his original conviction. However it makes no difference in this Court's present consideration of the case whether or not this is a correct interpretation of the Court's order of July 19, 1962. The fact is that there would then be pending before this Court a motion by appellant under Rules 39(a) and 45(b)(2) of the Federal Rules of Criminal Procedure to permit appellant to prosecute an appeal from his original conviction. Under this Court's decision in Belton v.

United States, 259 F.2d 811, 104 U.S. App. D.C. 84 (1958) this Court can consider the present appeal as one from the original conviction even though the appeal was not perfected within the period of time required by Rule 39(c) of the Federal Rules of Criminal Procedure. At page 814 of its decision in that case this Court stated as follows:

> "We think the appeal is here for us to decide. The verdict of the jury was rendered September 10, 1954. Judgment thereon was entered October 1, 1954. In the meantime, on September 14, 1954, there was filed in the office of the Clerk of the District Court a letter from appellant requesting inter alia that he be granted the privilege of 'receiving an appeal as I am without funds to pay the cost of court * * *.' This was an adequate and timely notice of appeal. Rule (37(a)(2) F.R.Crim.P., 18 U.S.C.; Boykin v. Huff, 73 App.D.C. 378, 121 F.2d 865; Williams v. United States, 88 U.S. App. D.C. 212, 188 F.2d 41; accord, Shannon v. United States, 93 U.S. App. D.C. 4, 206 F.2d 479; and see Kirksey v. United States, 94 U.S. App. D.C. 393, 395, note 2, 219 F.2d 499, 500, note 2. This court thus obtained jurisdiction to review the judgment of conviction. The fact that the notice of appeal was received by the clerk after the verdict and before entry of judgment thereon is an irregularity which does not affect substantial rights and should be disregarded. Lemke v. United States, 346 U.S. 325, 74 S. Ct. 1, 98 L. Ed. 3."

The only question then before this Court with respect to the scope of review in the present case would be whether the appellant's failure to docket the appeal within the 40 days after the filing of his notice of appeal was the result of excusable neglect.

The Government's brief argues (page 8) that there is nothing to show excusable neglect to allow an enlargement of appellant's appeal

into a full appeal on the merits citing the decision in Christoffel v. United States, 88 U.S. App. D.C. 1, 6, 190 F.2d 585, 590 (1950). An examination of this case shows that the neglect there involved was by the counsel for the individual appellant. In contrast appellant's motion of December 28, 1961 shows that appellant was not represented by counsel during the period within which he would have been required to perfect an appeal from his original conviction; that he was not advised by the District Court, by the Government, or by anyone else at that time, that if the District Court denied his application for an appeal in forma pauperis, that he had the right to ask this Court for leave to make such an appeal; that he was an untutored individual with little education and that he did not learn of his right to himself make appeals to this Court until several months after he had been committed to the penitentiary. He then believed it was too late to make a direct appeal so he filed the motion under 28 U.S.C., Section 2255, which was denied by the District Court, and from which he sought an appeal in this Court.

The Government also suggests in its brief (page 9) that this Court should not consider appellant's appeal at this time as an appeal from his original conviction under the decision in the Belton case because the Section 2255 petition does not raise any substantial questions as to the lawfulness of his conviction. This is all ground which has already been covered by memoranda previously filed with this Court both by the appellant and by the Government prior to the issuance of this Court's order of July 19, 1962 allowing the appellant to prosecute an appeal in forma pauperis. The original Section 2255 petition was a

document filed by an untutored layman in his own handwriting groping to articulate reasons which he felt warranted a reversal of his conviction below, but which were not expressed in legal terms and contained all of the defects to be expected in such a document. This Court's order of February 12, 1962 and its subsequent order of April 26, 1962 clearly showed that the Court desired the circumstances of appellant's trial to be thoroughly explored and that there be presented to this Court any issues, regardless of whether they were presented by the original Section 2255 petition or not, which counsel considered to be non-frivolous. This was done. Thereafter the Government argued as it does now that appellant raised only frivolous issues. This Court rejected that argument by allowing the appellant to proceed to prosecute an appeal in forma pauperis. It is now far too late for the Government to attempt to escape a full review of the validity of appellant's conviction by continuing to insist as it has done from the beginning that appellant raises only frivolous issues.

Finally, assuming arguendo that this Court does review appellant's case only within the limits of Section 2255, appellant submits that the District Court erred in dismissing his petition under that section without a hearing on the basis that the "files and records" of the case showed conclusively that appellant was entitled to no relief. The validity of this contention of appellant is clearly shown in the various memoranda previously filed with this Court and is evidenced by the fact that the Court by its order of July 19, 1962 permitted him to proceed with an appeal. The Government has not until this day in all of its memoranda posing any sort of consideration whatsoever of appellant's

case explained why, if the appellant's contentions were utterly lacking in merit, it was necessary for the District Court to hold his original Section 2255 motion for four months, and act upon it only after receipt of a legal memorandum from the Government, to which the District Court refused to give appellant an opportunity to reply.

Appellant therefore submits that:

1. This Court's order of July 19, 1962 allowed him to prosecute an appeal from his original conviction and that his present appeal should be considered on that basis;

2. That if appellant has misinterpreted this Court's order of July 19, 1962, appellant's motion of December 28, 1961 for permission to perfect an appeal from his original conviction is still pending before the Court, and that the Court in acting upon this case may grant that motion and may then take action on the merits of the appeal as briefed by the parties; or

3. That if consideration of this appeal is confined to Section 2255 the appellant's appeal clearly shows that the District Court erred in dismissing it without a hearing and that the District Court's action should be reversed.

Appellant will now proceed to reply to the Government's contentions on the merits.

II

The Merits

A. The trial court's error in misquoting defense counsel's arguments in charging the jury with respect to the credibility of witnesses.

At pages 16-21 of his brief, the appellant sets forth the error of the trial court in misquoting the argument of defense counsel while charging the jury on the issue of the credibility of witnesses, particularly the complaining witness. This error consisted of the statement by the trial court that the defense counsel had characterized testimony of the complaining witness, which defense counsel characterized as false, as being testimony on an immaterial point, whereas in fact defense counsel had vigorously argued that the testimony concerned a material fact (JA 22-23, 26).

In its brief, the Government attempts to slide over this clear error of the trial court, which the Government concedes was error, by burying it in the middle of a discussion on the trial court's instruction on the credibility of witnesses. (page 11) However, this clear error cannot be so easily eliminated.

First, the Government says that considering the manner in which the discrepancy between the testimony of the complaining witness and the other witness for the prosecution developed, the trial court's mistake was not "surprising". Such a claim does not, of course, constitute legal justification for the error. Moreover, defense counsel specifically called the error to the trial court's attention at the conclusion of the charge and asked that it be corrected.

Instead of correcting it, the trial court insisted that it was the defense counsel who was mistaken (JA 32). Thus the error cannot be justified, as the Government's brief suggests, on the grounds that it was inadvertent.

Second, the Government's brief suggests that the mistake could not have prejudiced the appellant and consequently was only harmless error. However, the mistake was made in the context of a trial in which it is uncontested that the conviction could not have been obtained without the testimony of the complaining witness and that a major issue in the trial was the credibility of the complaining witness. Moreover, defense counsel had vigorously argued to the jury as to the credibility of this witness and had supported his argument by pointing out that the complaining witness was contradicted on the one particular matter by the Government's other witness and thus had deliberately testified falsely to a material fact. Appellant submits that it was clearly harmful and prejudicial for the trial court, in the middle of a charge on the effect of false testimony on credibility, and after emphasizing that the false testimony must be on a material point, to tell the jury that defense counsel himself characterized the testimony as not on a material point. If the trial court felt that any comment at all was appropriate on defense counsel's argument at this point in the charge, it was clearly incumbent upon the trial court to make a comment which was accurate. This error was compounded by a refusal to correct the error after it was called to the trial court's attention.

The Government's brief suggests that the error made no difference because the testimony was in fact immaterial. The Government says that the appellant has not shown the materiality of the testimony in question. This is simply a flat statement in the Government brief made without regard to the points and authorities on this issue set forth at pages 18-21 of the appellant's brief. The Government makes this statement without any effort to refute the points and authorities there cited as to the materiality of the testimony in question, with the one exception of a reference to appellant's quotation from the decision in Blackmon v. United States, 108 F.2d 572 (5th Cir. 1940) The Government's brief says that the testimony which appellant contended was false was immaterial to the issue to be resolved in the case of whether appellant had made an assault on the complainant with a dangerous weapon. This, of course, was the ultimate issue in the case. It could be reached only by evidence with respect to facts and circumstances which tended to corroborate or strengthen the proof on this ultimate issue. As the 9th Circuit pointed out in the decision of Newman v. United States, 58 F.2d 751, quoted at page 18 of the appellant's brief, the term "material" with reference to testimony refers not only to the ultimate issue in a case but also to any fact or circumstance which tends to corroborate or strengthen the proof with respect thereto. The testimony involved developed as a result of the questions by the prosecutor to the complaining witness and its other principal witness with respect to such facts or circumstances, and as pointed out at page 18 of

appellant's brief, was the subject of a question by the trial court. The prosecution did not object at that time to any of the questions on this matter as relating to an immaterial matter.

Third, the Government suggests that the error made no difference because the jury heard the argument of defense counsel and could decide for itself that the trial court had made a mistake. Appellant submits that this theoretical and tenuous possibility hardly constitutes a sound basis on which to send a man to the penitentiary for a period of ten years. Juries are obviously affected by what a trial court tells them. It is much more likely that they will accept the trial court's statement as to what defense counsel said rather than rely upon an earlier recollection as to what he had argued.

Finally, the Government suggests that the error is harmless because it fell within the area of permissible comment by the trial court and cites two decisions in this court in support of this proposition. In the Beck case, cited by the Government, the trial court's comment consisted of a correct statement of law. The comment to which appellant here objects consisted of an incorrect statement of fact. The comment in the Wilson case, to which the Government refers, consisted of a statement by the trial court to the effect that it was his opinion that the rule with respect to false testimony was not applicable to any witness in that case. Here, the comment to which appellant objects was not an expression of opinion, to be taken by the jury as such, but a flat statement of fact, which was an inaccurate statement of fact. The two comments stand on entirely different ground and cannot be equated.

It is clear that the right of comment by a trial judge does not include comment which is inaccurate. Durham v. United States, 99 U.S. App. D.C. 132 F.2d 760 (1956).

B. The trial court's error in referring to the alleged false testimony as "that was not a material fact".

In addition to the error argued above, the appellant at page 17 of his brief contends that the trial court committed reversible error by inclusion in the charge on the effect of false testimony upon the credibility of a witness the phrase "that was not a material fact". The Government's brief contends (page 10) that this statement did not prejudice appellant and was merely comment akin to the trial court's power to rule on the relevance and admissibility of evidence. It also suggests that the comment was correct in that the testimony is not shown to have concerned a material fact.

The Government's brief fails to answer the points made by the appellant that this comment in the context of the charge (JA 26) to which appellant objects was completely confusing to the jury. Appellant's brief points out that the colloquy at JA 32 shows that the trial court itself did not know what was intended or meant by the comment. When defense counsel objected to the comment, the trial court denied that it had made any independent comment on the materiality or immateriality of the alleged false testimony and contended that the only statement made in the charge was a reference to what defense counsel himself had said (JA 32). If the trial court's own statements so confused that court that it was unable to unravel

them in the face of defense counsel's objections, it is difficult to perceive how it is that it did not leave the jury in the same state of mind. Appellant submits that the net result was to completely prejudice the appellant's contention as to the credibility of the complaining witness.

The Government's suggestion that the testimony did not concern a material fact is discussed above.

The Government's suggestion that this comment is akin to the judge's power to rule on the relevance and admissibility of evidence is defective in that (1) as shown at pages 18-21 of appellants brief, the ruling, if it was such, was erroneous, and (2) the trial court itself denied that he had made a comment or ruling and insisted that instead there had only been a reference to what defense counsel had said. Thus the record would clearly indicate that this comment was intended to be a reference to what defense counsel had said and, as such, is subject to the same error and objections raised with respect to that reference.

In Footnote 2 on page 10 of its brief, the Government states that even if the testimony involved were material, appellant did not preserve this matter by objection, since the only matters appellant objected to with respect to the refusal of requested instruction No. 2 was as to the characterization of the testimony by the trial court as not being on a material fact. This contention has no merit. The objection at JA 32 clearly shows that it began with an objection to the comment of the court on the testimony in question and proceeded

through a discussion of what defense counsel had said. Moreover, the colloquy at JA 31 shows that after defense counsel had proceeded to a point with objections to the charge to the jury as given, the trial court cut him off with the statement that "your record is complete in that you have taken exception to my refusal of your tender of instructions". Defense counsel then said "Yes" and added that he would like to get specifically into the record his objections to the charge on the false testimony point. (JA 32) Appellant thus submits that it is clear that defense counsel did in fact object to the trial court's comment.[1/]

C. <u>The trial court's error in not instructing the jury specifically that the Government had the burden of proof with respect to the defense that the assault was an accident</u>.

Appellant contends in his brief that the trial court erred in not specifically charging the jury that the Government had the burden of proving beyond a reasonable doubt that the alleged assault was not accidental.

The Government's brief argues (pages 12-15) that there was no error because the trial court had given a general charge on the burden of proof and then had explained what "beyond a reasonable doubt" meant. In its brief, appellant recognized the existence of the general instruction and also the fact that it is not necessary for a trial

---

1/ The Government brief contains no arguments with respect to the objections set forth at pages 21-24 of appellant's brief as to the charge on the effect of false testimony upon the credibility of witnesses because of the trial court's use of the phrase "if you deem it wiser to do so" while instructing the jury as to their discretion on the credibility issue.

court to repeat the admonition with respect to the burden of proof in charging on every element of the offense. However, appellant contended that such a general charge was not sufficient in a situation where there was a special defense such as was here involved, particularly where the charge on that defense was a complex one, difficult for the jury to understand. Appellant argued and still argues that the problem is like that stated in United States v. Barrasso, 267 F.2d 908, 910 (3rd Cir., 1959) cited at page 31 of appellant's brief. The Government makes no effort to distinguish the problem here involved from that dealt with in the Barrasso case, in which the 3rd Circuit rejected the contention that a "forceful general instruction stating in clear language that throughout the case the burden remains on the Government" was sufficient.

The Government suggests that if the jury found the assault from the testimony relating to the flashing of the gun and frightening of the complaining witness, the question of an accident was not present. However, there is no way to speculate what the jury would have found if there had not been an actual wounding of the complaining witness.

D. The trial court's error in denying applicant's motion for judgment of acquittal.

Appellant contends that the trial court erred in denying his motion for judgment of acquittal which was made both at the end of the Government's case and at the close of the testimony (JA 12-14, 21).2/

2/ Appellant's brief inadvertently omits the reference to the renewal of the motion at the close of the case at JA 21, which is correctly referred to in Footnote 5, page 21 of the Government's brief.

The appellant's brief and the Government's brief are in argreement as to the legal standard to be applied to such a motion but simply disagree as to the conclusions to be drawn from the evidence. It is the Government's contention that "When a person holds a gun and warns everyone in a group that he does not like them, and that 'nobody better not move or say anything,' logically he is assaulting every single person in that group." (Government Br. 15-16) The Government's argument would be more persuasive if the testimony were to the effect that the complaining witness was standing in the hall with a group and that the appellant pulled out a gun, pointed it at the group, and made the alleged statements. However, this testimony (JA 3-15) was to the effect that the complaining witness was coming to the first floor from upstairs, "noticed everyone standing in the hallway and Raymond Dean was standing in the front of the door and he had a gun in his hand", and after noticing this the complaining witness was "so stunned" that she came on down the stairs and "just stood right in front of the crowd, right in front of everybody" (JA 3). Assuming the validity of the Government's argument, appellant submits that the assault does not apply to someone who is upstairs, who comes out and sees the action going on, comes down the stairs, pushes her way through a crowd, and places herself directly in front. There is clearly absent in this tableau any element of an intent to frighten, scare or hurt the complaining witness, particularly when the evidence showed that they were friendly (JA 5).

Conclusion

Upon the basis of the foregoing points and authorities appellant submits:

1. The court should review this case as an appeal from appellant's conviction and sentence in the United States District Court and not solely as a petition under 28 United States Code, Section 2255.

2. The court should, upon such review, find that the District Court committed reversible error in appellant's trial and conviction and reverse such conviction.

Respectfully submitted,

JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Appellant
(Appointed by this Court)

December 7, 1962

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 17,214

RAYMOND DEAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

OCT 10 1962

Joseph W. Stewart

CLERK

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JOINT APPENDIX

[Filed October 5, 1959]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on August 27, 1959, Sworn in on September 1, 1959

THE UNITED STATES OF AMERICA	Criminal No. 896-59
	Grand Jury No. 1135-59
vs	Assault With a Dangerous Weapon (22-502 D.C. Code)
RAYMOND DEAN	

The Grand Jury charges:

On or about April 13, 1958, within the District of Columbia, Raymond Dean made an assault on Sallie B. Alston with a dangerous weapon, that is, a pistol.

/s/ OLIVER GASCH
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ Harry J. Parrett
Deputy Foreman

[Filed October 9, 1959]

PLEA OF DEFENDANT

On this 9th day of October, 1959, the defendant Raymond Dean, appearing in proper person and without counsel present, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is remanded to the District Jail.

By direction of

GEORGE L. HART, JR.
Presiding Judge
Criminal Court # 1

Present:

United States Attorney

By John Warner
Assistant U. S. Attorney

* * * * * *

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.
Monday, November 9, 1959

The above-styled cause came on for hearing before THE HONORABLE JOSEPH R. JACKSON, United States District Judge, at approximately 2:10 o'clock p.m.

APPEARANCES:

On behalf of the Government:

THOMAS M. O'MALLEY, Esq.
Asst. United States Attorney

On behalf of the defendant:

JULIUS W. ROBERTSON, Esq.
DOVEY J. ROUNDTREE, Esq.

* * * * *

14 SALLIE B. ALSTON

was called as a witness on behalf of the Government, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. O'MALLEY:

15 Q. State your name, please. A. Sallie Alston.

Q. And where do you live Miss Alston? A. 2321 - 14 th Place, Southeast.

* * * * *

Q. Directing your attention to the evening of April 12th, 1958, do you recall your whereabouts at that time? A. I was on Maryland Avenue, at a party.

Q. At a party? A. Yes.

Q. Whose party was it? A. It was Mabel Owens'.

16 Q. And do you recall the location on Maryland Avenue? A. It was 1213.

* * * * *

Q. Is that in the District of Columbia? A. Yes, it is.

Q. Now, did there come a time when something unusual happened? A. Well, at the party everyone was eating and drinking and dancing.

Q. Where did this take place; on what floor? A. The first floor.

Q. Did there come a time when you left the first floor? A. Yes, I left the first floor and went up to the ladies' room.

Q. All right. And how long did you remain upstairs, if you recall? A. Oh, about five minutes or more.

Q. Did there come a time when you returned to the first floor?

17 A. Yes, it did.

Q. And on returning to the first floor did you notice anything unusual? A. Well, I noticed every one was standing in the hallway and Raymond Dean was standing in the front of the door and he had a gun in his hand.

Q. All right. What happened then? A. Well, I was so stunned when I came down the steps I just stood right in front of the crowd, right in front of everybody, and I couldn't move, and he had the gun, flashing the gun.

Q. You say you couldn't move. What prevented you from moving? A. I was frightened.

Q. All right. What happened then? A. Well, he was cursing

and swearing. He said he didn't like any -- and he was calling names. He said he didn't like the people that was there and nobody better not move or say anything.

Q. You say he called names. Did he call more than one name to persons he didn't like? A. No, he were calling provoking language.

Q. Do you recall whether he was directing that vulgar language to anybody in particular or just at the people generally? A. At the

18 people generally, no one in particular.

Q. All right. Then what is the next thing you recall happening? A. Well, I recall I looked and he had this gun. The gun went off and he shot me in the hip.

Q. What hip? A. On the right hip.

Q. Now you said Raymond Dean had shot you. Do you see that person in court today? A. Yes, I do.

Q. Would you point to him, please? A. Over there.

* * * * *

MR. O'MALLEY: She has identified Raymond Dean for the record?

THE COURT: Yes; it may show that.

BY MR. O'MALLEY:

* * * * *

19 A. I didn't know what was going on after I was shot. I know I said, "I'm shot; I'm shot."

Q. Do you recall saying anything after that? A. No.

Q. What is the next recollection you have? A. Well, someone taking me to the hospital, to D. C. General Hospital, and the doctors and police was talking with me.

Q. * * * How long did you remain at the District of Columbia General Hospital? A. The first time I was there about three weeks and a half.

* * * * *

20 Q. You say you subsequently went back to the hospital? A. Yes, I went back to the hospital about two-and-a-half weeks, and I had

another serious operation.

* * * * *

21 CROSS EXAMINATION

BY MR. ROBERTSON:

Q. Miss Alston, how did you get to the party that night? A. How did I get there?

Q. Yes. A. I took a cab there.

Q. Anyone go with you? A. No. I took a cab to the party.

THE COURT: Was anybody in the cab with you?

THE WITNESS: No.

THE COURT: All right.

* * * * *

23 Q. Now, you say you know Mr. Dean? A. Yes, I do.

Q. How long have you known him? A. Oh, approximately -- about five or six months. We worked together.

Q. I see. Did you ever have any argument with him whatsoever? A. No; never.

24 Q. You and he get along friendly? A. Yes.

Q. Did you ever have any animosity or any feelings of dislike for him? A. No.

Q. Did he towards you? A. No, not that I know of.

Q. Very well. Now, do you know whose house this party was in? A. It was at his aunt's house.

Q. Yes. Now, is it your testimony that he was saying that he didn't like anybody at the party? A. Yes, that's what he was saying. He was speaking of the Aristo bunch that he worked with.

Q. Did he say that? A. No.

* * * * *

26 Q. Do you recall talking to an Officer Washington, a tall nice-looking officer? A. Yes, I do.

Q. Now, do you recall -- is it not a fact you told him it was accidental? A. I don't remember telling him it was accidental.

Q. Well, now -- A. He asked me was it accidental.

Q. How's that?

THE COURT: He asked her if it was accidental, she said.

BY MR. ROBERTSON:

Q. And what did you say to that, Miss Alston? A. I can't recall just offhand.

Q. You can't recall what you told him? A. No.

* * * * *

27 Q. Well, do you recall whether or not he asked you if it was accidental? A. I don't recall whether it was on that occasion or not, but I know he asked me did I think it was accidental.

28 Q. Are you able to tell us what your reply to that question was?

MR. O'MALLEY: I object, to the question, Your Honor.

THE COURT: Why?

MR. O'MALLEY: It calls for a conclusion from the witness.

THE COURT: I don't think so. Objection overruled.

Do you remember the question?

MR. ROBERTSON: May the reporter read it, Your Honor?

THE COURT: I thought you might save time by repeating it, if you could.

MR. ROBERTSON: All right.

BY MR. ROBERTSON:

Q. Are you able to recall and tell us what your answer to that question was?

THE COURT: Do you remember, in other words, what your answer was?

THE WITNESS: To which question?

THE COURT: Whether you thought it was an accident.

THE WITNESS: I told him I didn't know because he didn't have any reason to shoot me. We had never had an argument or anything. I was nothing to him, and we had worked together all the time and got

29 along together.

* * * * *

30 PHALA KING

was called as a witness on behalf of the Government, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. O'MALLEY:

Q. State your name, please. A. My name is Mrs. Phala King.

Q. Where do you live, Mrs. King? A. 118 Quincy Place, Northeast.

* * * * *

31 Q. Directing your attention to the evening of April 12, 1958, do you recall where you were at that time? A. Well April 12th I went to this party.

Q. Where was the party, if you know? A. Well, I don't know the exact address but I do know it was on Maryland Avenue, Northeast.

Q. Is that in the District of Columbia? A. Yes, it is.

Q. All right. And do you know whether or not Sallie Alston was there? A. Yes, she was there because we went there together.

Q. Did you? And how about Raymond Dean? A. He was there when I got to the party.

Q. Now did there come a time when something unusual happened at the party? A. Well, the party was given in the basement. We was down in the basement. Sallie was dancing at the time and this fellow Dean and another fellow by the name of Charlie Barnes, they was arguing. So I told Sallie Let's go home because there was going to be a fight, and somebody was going to jail.

32 Q. What did you do then? A. So I went upstairs, Sallie and I. Sallie said she had to go to the bathroom, so I sit down at the end of the dining room table.

Q. What floor is that on, the basement or the first floor? A. It was on the first floor.

* * * * *

Q. All right. You saw Sallie go upstairs? A. Yes.

Q. While she was upstairs did anything further happen on the first floor? A. Well, I was sitting in the dining room and Dean was at the door, and he made a statement that he didn't like none of the Negros that worked at Aristo Cleaners.

Q. All right. What else happened at that time? A. Then Sallie came down the steps. She ran in the dining room and said she was shot.

33 Q. Did you hear anything? A. No, I didn't.

Q. Now you said something about a person named Dean who made this statement. Do you see this person in court today?

* * * * *

THE COURT: Let the record show the witness identified the defendant as being in court.

BY MR. O'MALLEY:

Q. Now when Dean was making these statements did you notice anything else unusual about it? A. No, I didn't, because I didn't pay him any attention.

Q. How many other people were present on the first floor at the time he was making these statements? A. Well, in the dining room at the table where I sat was two people, a fellow by the name of Mr. Kidd, and a Mr. Smith. We was sitting at the table.

Q. Now from where you were seated at the table could you see Sallie Alston? A. Well I could see in the hall, and that's where she got hurt at, in the hall.

34 Q. But after a time she came to you and said she was shot; is that it? A. She came in and she grabbed Dean's aunt, which her name was Mabel. She said, "Mabel, I'm shot." So Dean's wife, she came in and said --

Q. Don't tell us about that conversation.

What did you see Dean do then? A. Well, he was still standing at the door.

Q. All right.

Now, did there come a time when the police arrived on the scene? A. I wasn't there.

Q. When you left was Dean still there? A. Well, no. He and his wife were running toward 13th Street, Northeast.

Q. They what? A. They had ran towards 13th Street, Northeast.

* * * * *

35 CROSS EXAMINATION

BY MR. ROBERTSON:

* * * * *

Q. I see. Now, at this party over on Maryland Avenue, you say you went over there with Sallie Alston? A. Sallie Alston went with me and a girlfriend by the name of Mary, she had a car. And Mary and I are very dear friends, we worked together.

Q. At Aristo? A. Yes.

Q. So Sallie works at Aristo too, doesn't she? A. Yes, she do.

Q. You and your friend Mary went in your friend's car and Sallie went in your friend's car? A. Yes.

Q. You're sure of that? A. Sure.

* * * * *

36 Q. Now Mrs. King, you were in the dining room at the time when the complaining witness said she was shot, weren't you? A. Yes, I was.

Q. Seated at the dining room table? A. Yes.

Q. With a Mr. Kidd and a Mr. Smith? A. Yes.

37 Q. And it was your testimony that you didn't see anything unusual about the Defendant Dean when you heard him saying that he didn't like the Aristo people? A. Well, no; he always looked the same to me.

Q. Was he cussing? A. No, he wasn't.

Q. Was he using vulgar language? A. No, he was not.

* * * * *

38 Q. Did any of the officers talk to you about this case? A. It was an officer at the hospital when I got there, but I don't know his name because I been drinking. I thought he was a newspaperman.

Q. Did you give him a statement? A. He asked me could I identify Dean if I would see him again, and I told him Yes I could, and

he asked me what was he wearing and I told him.

Q. Now Mrs. King, did he ask you whether or not the shooting was accidental? A. He didn't ask me anything about the shooting because I told him I didn't hear the gun go off, I didn't see the gun, I don't know nothing about the shooting.

* * * * *

40 JOHN STANCIL

was called as a witness on behalf of the Government, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. O'MALLEY:

Q. State your name, please. A. John Stancil, S-t-a-n-c-i-l.

Q. How are you employed? A. Admitting Clerk and Examiner, D. C. General Hospital.

Q. Are you here in response to a subpoena? A. That's right.

Q. What did you bring with you? A. I have the records of Mrs. Alston, Sallie B. Alston.

* * * * *

41 A. I have it here -- here is the discharge for the first date, in pen, 4/30/58. That was the date of discharge.

Q. April 30th, 1958? A. For the first admission.

Q. When was she admitted the second time? A. On 5/14/58.

Q. When was she discharged the second time? A. 6/2/58.

42 * * * * *

CROSS EXAMINATION

BY MR. ROBERTSON:

* * * * *

44 THE COURT: Will one of you hand me that record; I want to see it.

(Record was handed up to the Court.)

THE COURT: Who wrote this down?

THE WITNESS: I imagine it's one of the doctors at the hospital.

THE COURT: Well we ought to have an investigation there to keep these things proper. Right at the top here it says shot in the

buttocks. You didn't read that, sir.

THE WITNESS: I did, sir.

THE COURT: You did? I didn't understand you then.

Well, it is a record any hospital ought to be ashamed of turning out, I will say that. You have read it as well as I can read it though.

* * * * *

45 MELVIN J. WASHINGTON

was called as a witness on behalf of the Government, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. O'MALLEY:

Q. State your name, please. A. Melvin J. Washington.

Q. And how are you employed? A. I am employed by the Metropolitan Police Department assigned to duty at No. 2 Precinct.

* * * * *

46 Q. Now directing your attention again back to 1232 Maryland Avenue, Northeast, did you see a Raymond Dean there when you arrived? A. No, I didn't.

47 Q. At that time did you make a search of the premises? A. I did.

Q. And did you find Mr. Raymond Dean? A. No, I did not.

Q. Did you find a gun? A. No, I did not.

Q. Did you look for a gun? A. Yes, sir.

Q. Now, what did you next do as regards Raymond Dean? A. The next thing I did was sent a look-out over the police communication system by radio.

Q. All right. Did you ever determine where Raymond Dean lived? A. Yes, sir.

Q. What did you do with reference to his place of abode? A. I directed that his house be planted.

Q. Be planted -- what do you mean by that?

THE COURT: Watched. Stake-out there; is that it?

THE WITNESS: Yes, sir.

THE COURT: Somebody watched the place.

BY MR. O'MALLEY:

Q. All right. As a result of that planting, did you ever determine the whereabouts of Defendant Raymond Dean? A. As a result

48 of that planting we determined that he didn't return home immediately or during the time the place was planted. However, a short while later we received information that he fled the jurisdiction.

Q. A short while later -- how long a period of time was that?

A. I'd say about eight hours.

* * * * *

CROSS EXAMINATION

BY MR. ROBERTSON:

* * * * *

51 Q. Let me ask you this: You have no knowledge of your own as to how this shooting occurred, do you?

THE COURT: You weren't there, you don't know how it occurred, do you?

THE WITNESS: No, sir.

* * * * *

52 MR. ROBERTSON: If Your Honor please, in the absence of this jury we would like to make a motion and argue.

THE COURT: You may. Give me the reasons. I don't know whether I will let you argue.

MR. ROBERTSON: If Your Honor please, the defendant moves for a judgment of acquittal on the following grounds:

It is incumbent upon the Government to prove every element of the offense charged. Here is an assault, and on our code we refer to common law definition of the assault and as part and parcel of the Government proof, the Government must negativate the accident.

I think here the Government has failed to carry the burden of proof on that point. There has been no showing this was not an accident. It is not incumbent upon the defendant to show it was.

I think that the testimony of the complaining witness in which Your

Honor will recall in regards to the question of whether or not she ever told the officer it was an accident -- she was equivocal, evasive and did not give testimony which was clear and convincing and proving the

53 point. I think that on that, if Your Honor please, that the defendant should not be required to put in a defense, that the Government must prove this was not an accidental shooting. I think if you take the testimony of the complaining witness alone --

THE COURT: I don't know what law you have to show that but it seems to me that is largely a matter for defense rather than for the determination of the jury.

MR. ROBERTSON: Your Honor, may I cite on that --

THE COURT: Yes, I would like the law.

MR. ROBERTSON: American Jurisprudence, Volume IV.

THE COURT: What would the jury have to do if the prosecution negativates the accident? Then it would be a purposeful assault with a deadly weapon, wouldn't it?

MR. ROBERTSON: Yes; right, Your Honor.

THE COURT: Precisely what would the function of the jury be? It's up to the jury to determine whether it was accidental or not.

MR. ROBERTSON: The Government has put on no evidence to go to the jury on that point.

THE COURT: How about the defense?

MR. ROBERTSON: May I just read this, if Your Honor please?

THE COURT: Yes. What Court is that?

54 MR. ROBERTSON: This is American Jurisprudence. We have our Court of Appeals, which is my next citation.

THE COURT: What Court is this? What are you reading from, please?

MR. ROBERTSON: Volume IV, American Jurisprudence.

THE COURT: Suppose you read the law that you say is the law of this district.

MR. ROBERTSON: In the case of Nesan versus United States,

the Court said this is construing the same broad provisio ns in the Municipal Court of Appeals.

THE COURT: Municipal Court of Appeals?

MR. ROBERTSON: That's right, Your Honor.

THE COURT: Who wrote the opinion?

MR. ROBERTSON: The opinion was written by Associate Judge Quinn.

THE COURT: All right.

MR. ROBERTSON: Judge Quinn says:

"As we have said above, it is incumbent upon the prosecution to show that the act of the defendant was not accidental and that he had the necessary criminal intent."

I say on the evidence which has been put in today, Your Honor, there has been no such showing that it was not accidental as the law required.

55 So for that reason the defendant should be acquitted by virtue of Your Honor's directing the judgment of acquittal.

THE COURT: What do you have to say, Mr. O'Malley?

MR. O'MALLEY: Your Honor, the Government put in facts that they can show the general intent. The witnesses said he lined up a group of people he didn't like.

THE COURT: That is clear. How about negativating an accident?

MR. O'MALLEY: The positive testimony reverses negativating, Your Honor.

THE COURT: Motion denied.

* * * * *

57 MABEL OWENS

was called as a witness on behalf of the defendant, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTSON:

Q. Mrs. Owens, speak up loudly so His Honor and these ladies

and gentlemen of the jury can hear you.

What is your name? A. My name is Mabel Owens.

Q. Where do you live? A. 1232 Maryland Avenue, Northeast.

58 Q. Directing your attention to the 12th of April, 1958, did you have a party at your home? A. Yes, I had a get-together with the family and some friends.

Q. Do you know Miss Alston? A. Yes. Me and Miss Alston worked together quite a while.

Q. Did you work at Aristo too? A. Yes, sir, I did.

Q. Were you friendly with Miss Alston? A. Yes, sir, I was.

Q. I take it she was invited to your party? A. Yes. Some friends of hers came over there.

Q. I see. Where was the party being held in your house? A. Well, the girls and my nephews and nieces were in the basement playing some records, and Miss Alston and I were in the dining room setting down and talking.

Q. Did there come a time when Miss Alston got ready to go home and went to get her coat? A. Miss Alston said to me, I'm ready to go. I went into the living room and got her coat and scarf. She said Good night, and said she had a nice time.

Q. Were there a number of people in the hall at that time?

59 A. No, it wasn't.

Q. Were you there when anything unusual happened? A. No, it wasn't anything unusual happening. She was leaving.

Q. Now did she ever get a chance to leave? A. No. She was going out the door and she says Good night. I didn't know anything more about it, until the other girl asked me hand her her coat and I went back in the living room. Miss Alston came back to me and said "I'm shot."

Q. Prior to the time she came to tell you she was shot, had you heard any commotion? A. No, not a sound, no commotion at all.

Q. Had you heard any cussing or loud noise in the hallway?

A. No, there was no loud cussing or noise in the hallway.

Q. How wide or big is the hall? A. The hall is a small hall leading to the dining room. The front door -- it wouldn't hold a lot of people -- awful small.

* * * * *

60 Q. I see. Did you see the defendant, Mr. Dean, in the hallway standing some people up against the wall and cussing at them? A. No.

Q. With a gun on them? A. No.

Q. If that happened, could you have seen it? A. I would have seen it in the hall from the dining room.

* * * * *

61 CROSS EXAMINATION

BY MR. O'MALLEY:

Q. Are you some relation to the defendant? A. I am Raymond

62 Dean's aunt.

* * * * *

Q. You didn't hear the shot? A. No, I didn't hear anything because Miss Alston ran to me and said, "Mabel, I'm shot." I said, "No, Miss Alston, you can't be."

* * * * *

63 Q. Did you determine who attemped to shoot her? A. I didn't know who it was. Everybody in the hall said Dean. I said it can't be Dean.

* * * * *

64 Q. Miss Alston told you Dean shot her? A. She said she was shot. She didn't call anyone by name.

* * * * *

65 Q. My question is, how soon was it after Miss Alston told you she had been shot before you heard this somebody say that Dean had shot her? A. Well, Miss Alston was going out the door to the doctor. Somebody said Dean shot her, and I said, "Can't be."

* * * * *

69 Washington, D.C.
Tuesday
November 10, 1959

* * * * *

70 JAMES NELSON ELLIS

was called as a witness on behalf of the defendant, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTSON:

Q. Tell us your name. A. My name is James Nelson Ellis.

Q. And where do you live? A. 174 U Street, Northeast.

Q. Are you acquainted with the defendant in this case, Raymond Dean? A. Yes, I am.

Q. Do you know the complaining witness, Miss Alston? A. Yes,
71 I do.

* * * * *

Q. Directing your attention to April 11, 1958, did you have occasion to attend a party on Maryland Avenue, Northeast? A. Yes, I did.

Q. In whose home was this party? A. My mother's.

Q. Is that Mrs. Owens? A. Mrs. Owens.

Q. Were you there at the time when Miss Alston was there? A. Yes, I was.

Q. Did you see her on the premises? A. Not until after the accident.

Q. I see. Now, where were you -- were you in the basement? A. I was at the end of the step in the basement, which is a box landing, plugging up an amplifier.

Q. Now, at the time when Miss Alston was shot, where were you? A. I was still at the same place.

Q. At the landing? A. At the landing, at the bottom of the steps.

* * * * *

72 Q. Now, did you come up into the hall in the first floor at any
73 time? A. I came up after the accident.

Q. Were there any -- did you see any people standing in the hall? A. There was three people to my recalls, in the hall.

Q. Do you know who they were? A. One was my mother, the other was her and Lenny going out the door.

Q. Those are the only people you seen going out the door? A. At that time, yes.

Q. Prior to the shooting did you hear any noise or cussing or vulgar language, or noise of any kind? A. No, I didn't hear no cussing.

Q. If there had been such a commotion would you have been able to hear it? A. Yes, I could.

* * * * *

74 Q. Did you hear any loud voices? A. No, I didn't.

Q. At the time of this shooting, did you see it? A. I didn't see the shooting.

* * * * *

Q. Did you hear the shot? A. I heard the noise. I didn't determine whether it was a shot then.

THE COURT: What did it sound like if it didn't sound like a shot
75 to you?

THE WITNESS: Sounded like you drop a cherry bomb; made a bop noise. I thought it was me at first. I dropped the thing, walked up the steps, walked up to the top of the steps. I heard the lady say she was shot. Scared me. I saw my cousin going out the door and they said it was him.

BY MR. ROBERTSON:

Q. Mr. Ellis, you said you were connecting up an amplifier? A. Yes.

Q. From where you were could you see in the dining room? A. I could see the dining room and the center door leading to the kitchen directly in front of me.

Q. And you could see all that? A. Yes.

Q. That's on the first floor? A. Yes, in front of me.

Q. Where is the hall from the point at which you were standing? A. The hall is prior to the facing of the steps.

THE COURT: The steps go up into the hall?

THE WITNESS: No, it leads up into the dining room.

* * * * *

76 BY MR. ROBERTSON:

Q. How much time elapsed from the time you heard this sound until the time you came upstairs? A. I couldn't exactly know. I couldn't say exactly how much time. I didn't lose any time.

Q. Did you come directly upstairs? A. I went directly upstairs.

Q. So the time that elapsed would be the time it would take you to get up the stairs? A. I didn't exactly walk.

Q. You ran? A. Yes.

Q. When you got there could you see out in the hall? A. When I got there I was directly in front of the hall.

Q. You were in the hall? A. Yes, I was right in the hall.

* * * * *

77 Q. Now then, when you came up the stairs, immediately after hearing the shot, in the hall you only saw three people? A. I only saw three people. I stopped right there when I heard the lady say, "I was shot." I didn't know what to do. I got shook up myself.

Q. I see. Now, did you see a gun? A. I at no time seen a gun.

* * * * *

CROSS EXAMINATION

BY MR. O'MALLEY:

Q. What relation are you to Defendant Dean? A. First cousin.

* * * * *

78 Q. So you were at the top of the stairs in a matter of a few seconds after the shooting? A. Yes.

Q. At the time you arrived there you saw your cousin Raymond Dean going out the door? A. Yes. He was going out the front door when I got to the top of the stairs, yes.

* * * * *

79 Q. Going out the door, excuse me.

You testified it was an accident. Now you don't have anything to base that on, anything that you saw, do you? Can you answer that yes or no? A. Well, I'd say no, that way.

* * * * *

81 GOLDEN WAYS

was called as a witness on behalf of the defendant, was duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. ROBERTSON:

Q. Now, sir, will you speak up loudly?

Tell us your name. A. Golden Ways.

Q. What is your address, Mr. Ways? A. My what?

Q. Where do you live? A. 127 Quincy Place, Northeast.

Q. Do you know the defendant in this case, Raymond Dean?

A. I do.

Q. Do you know this Miss Alston? A. Yes.

* * * * *

82 Q. Now, in April of 1958 were you at a party in Maryland Avenue?

A. I don't know what the date was, but I was there.

Q. You were there? A. Yes.

* * * * *

Q. What part of the house were you in, downstairs, first floor, or where? A. Down in the basement.

Q. Did you see Raymond Dean down there in the basement?

A. I saw him down there.

Q. At any time you were there did you have occasion to go up to the first floor in the hall? A. Not until I got ready to leave.

Q. Did you hear any noise or commotion upstairs in the hall?
A. No argument.

Q. You heard no argument? A. No.

Q. If there had been a commotion in the hall, or some loud noise
83 or something of that nature, could you have heard it in the basement? A. I could hear it if it was arguing. All I heard was people laughing.

Q. People laughing? A. Laughing and talking. There was no argument.

* * * * *

84 (AT THE BENCH:)

MR. ROBERTSON: If Your Honor please, the defendant moves for judgment of acquittal.

THE COURT: Denied.

MR. ROBERTSON: Very well, Your Honor.

* * * * *

MR. ROBERTSON: We submitted prayers, Your Honor.

THE COURT: The pertinent prayers are covered. I will bring that out.

MR. ROBERTSON: Very well, Your Honor.

THE COURT: The three of them are refused as being covered, or the portions that I approve of are covered. So if I gave them as modified,
85 I would have to say they are covered anyhow.

MR. ROBERTSON: May the record show an objection to the refusal of the granting of our prayers in the charge?

THE COURT: Yes.

(IN OPEN COURT:)

* * * * *

GOVERNMENT'S OPENING ARGUMENT TO THE JURY

BY MR. O'MALLEY:

* * * * *

86 She came down and stood among those people. She was held at gunpoint and she said she was frightened and couldn't move. I submit

to you ladies and gentlemen of the jury that the charge in this indictment was assault with a gun and that at that time the crime had already been committed when Raymond Dean merely held that gun on the complaining witness, Sallie B. Alston, among others.

When the gun goes off or doesn't go off in no way affects the central issue in this case, whether or not this defendant Raymond Dean

87 assaulted Sallie B. Alston.

The gun going off and the bullet hitting her is so much icing on the cake, if you will, because the crime had been committed when he made the assault with the gun on Sallie B. Alston thus putting her in fear, as she has testified.

Now in many cases, as you know, there is an issue of credibility. In this case the issue of credibility is not so clearcut as it might be in most cases.

* * * * *

89 CLOSING ARGUMENT FOR THE DEFENDANT

BY MR. ROBERTSON:

* * * * *

90 Now as Government counsel said to you as in most criminal cases there is a question of credibility. In other words, if the position advanced by the prosecution and defendant is in conflict, you and you alone are to decide whom you are to believe, where the truth lies.

* * * * *

91 Now the Court will instruct you in essence with regard to credibility. I say to you that you are to carry into your deliberations your own experiences as men and women of affairs in judging when a person is telling the truth. You can consider the demeanor of the person, their directness, their forthrightness, their motive to subvert the truth.

* * * * *

Now let's look at what the Government has proven. Of course, Miss Alston was shot. A very unfortunate occurrence. And, of course, it occurred in the District of Columbia at the address in controversy here. We do not contest the fact that the gun was held by the defendant, Raymond Dean. The only testimony that this occurred in an intentional manner or as a result of unlawful conduct was the testimony of the complaining witness.

And I say here credibility is crucial, and I wish to call your attention here to testimony about another matter. I say it is a material matter about which she could not have been mistaken, and I say to you that her testimony on that was false.

92 You will recall I asked her how did you get to the party and she said she went alone. And then the Government's witness, the second lady to testify, said that the complaining witness went with her in a car driven by her friend, the three of them went together.

I say to you, ladies and gentlemen of the jury, if a person will testify falsely, wilfully, about such a matter, when the whole Government case rests on the testimony of that person with regard to this commotion in the hall, then you should disbelieve that, and if you disbelieve that then you have to acquit the defendant.

* * * * *

97 CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT

BY MR. O'MALLEY:

* * * * *

98 I submit to you that situation is analygous to Sallie B. Alston when some nineteen months ago, as she is testifying to now, she testified she went over there by herself in a taxicab, yet the second Government witness gets on the stand and testifies they went together in a taxicab.

What relevancy, what materiality does that have in the issues in this case? I submit absolutely none. What counsel said is wilfully falsified because of this testimony, that he is carrying the language a little farther than he should be carrying it.

* * * * *

101 COURT'S CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury:

We have now arrived at that stage of the proceedings where the full responsibility falls on you. That responsibility is a grave one. You are here judging as to whether or not the defendant should be punished for an offense against the public, not an offense against an individual, because it is the public, the Government, who is prosecuting this case. Therefore, it is the Government against an individual, and not one individual against another. It is a grave responsibility.

102 You can be sure of this though: The complainant was shot and she was shot by a gun and the gun was held in the hands of the defendant. There is no argument about that at all. Now I will give you my instructions.

The case has been short. You have heard the evidence. You have heard the statements and arguments of counsel for both the prosecution and the defense. It now becomes your duty to determine whether or not the defendant is guilty of the offense with which he is charged.

Before discussing the charge against the defendant in detail I shall summarize for you the general principles of law that must govern you and guide you in determining the issues in this case.

It is the function and the duty of you men and women of the jury to determine the issues of fact. It is the duty of the Court to instruct you as to the principles and rules of law governing the case. You are bound and obligated to follow the Court's instructions as to the law and take the law from the Court.

Your verdict must be based upon your finding of fact within the framework of the law that is given to you by me, never forget that. You are the sole judges of the facts and you must determine the facts for yourselves solely upon the evidence presented at this trial.

103 The fact that the defendant is charged with a crime and has been indicted is not to be taken as any indication of his guilt. The sole purpose of the indictment is to bring the defendant before the Court.

An indictment is but the machinery and the procedure provided by law for placing a defendant on trial.

Every defendant in a criminal case is presumed to be innocent and that presumption attaches to the defendant throughout the trial. The burden of proof, as has been stated to you, is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains that burden and proves beyond a reasonable doubt that the defendant has committed every element of the crime with which he is charged, the jury must find the defendant not guilty.

Proof beyond a reasonable doubt, however, does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty and not necessarily proof to a mathematical or absolute certainty. By reasonable doubt is as its name implies, a doubt which is based on reason, a doubt for which you can give a reason to yourself, and not just any whimsical speculation or capricious conjecture or guess.

Proof beyond a reasonable doubt simply means this: If after

104 impartial comparison and consideration of all the evidence here you can say to yourselves you are not satisfied with the defendant's guilt, then you have a reasonable doubt.

On the other hand, if after such an impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, then you have no reasonable doubt.

In determining whether the Government has established the charge against the defendant beyond a reasonable doubt you will consider and weigh the testimony of all the witnesses who have testified before you and all the circumstances concerning which testimony has been introduced.

You are the sole judges of the credibility of witnesses. In other words, you and you alone are to determine whether to believe any witness and the extent to which any witness should be credited.

In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you are to take into consideration the witnesses manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, and whether the witness has any interest in the outcome of the case. All of
105 those matters as well as any other factors that appear to you as having a bearing on this matter you may consider and weigh in determining what witnesses to believe and the extent to which you credit them.

If you find that any witness wilfully testified falsely as to any material fact -- mark that well, that word "material", as used by counsel for the defense, who said the discrepancy of the testimony concerning the arrival of the complainant at the place where the party was held was immaterial -- mark well this: If you find they wilfully testified falsely as to any material fact -- that was not a material fact -- concerning which the witness could not possibly have been mistaken, then you are at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness or any part of such testimony.

The testimony of one witness whom you may find entitled to full credit is sufficient for the proof of any fact and can justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary.

You are not to permit yourself to be influenced by anything the Court has said or done which has suggested to you that he is inclined to favor the position of either the Government or the defendant. I have not
106 intended to express nor to intimate any opinion as to what witnesses are worthy of belief or disbelief, what facts are established, what facts have not been established, or what inferences may be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I earnestly instruct you to disregard it.

The Court instructs you that if there is a conflict in the evidence of this case on any fact or circumstance tending to establish either the

guilt or innocense of the defendant, a part of which is in favor of the theory of the Government and a part of which is in favor of the theory of the defendant, and you should entertain a reasonable doubt as to which is true, then it is your duty in arriving at your verdict to adopt the evidence on the theory or conclusion which is most favorable to the defendant.

In criminal cases there are two types of evidence known as direct and circumstantial. Direct evidence is proof which tends to show the existence of a fact in question without the intervention of proof of any other fact. It is that evidence which if believed establishes the truth of the fact and issue and does not arise from any presumption.

Evidence is direct when the very facts in dispute are communicated
107 by those who have the actual knowledge of them by means of their senses.

Circumstantial evidence consists of circumstances from which the defendant's guilt may be inferred by the jury. One cannot say which of the two types is more reasonably reliable or stronger. If the circumstantial evidence is sufficiently strong it may be as convincing as direct evidence because circumstances speak for themselves and if they are strong enough they may lead to a very definite conclusion.

The law permits the conviction of a criminal offense on circumstantial evidence alone, but in order to justify a verdict of guilty on the basis of circumstantial evidence alone, that evidence must be inconsistent with any other theory except that of the defendant's guilt.

Both kinds of evidence, direct and circumstantial, are entitled to consideration by the jury. But the rule of law is that whether the evidence is direct or circumstantial or a combination of both, before you may find the defendant guilty you must find that the evidence proves beyond a reasonable doubt the essential elements of the crime with which the defendant is charged.

The flight or concealment of a person immediately after the commission of a crime is not sufficient in itself to establish a verdict

108 of guilty but is a fact which if proved may be considered by the jury in the light of all the other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance attached to such a circumstance, are matters for determination by the jury.

The law does not compel a defendant to take the witness stand and testify. Therefore, no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify.

The arguments of the lawyers in this case are entitled to your careful consideration insofar as you find them logical and reasonable. You are to remember, however, that the lawyers are advocates of their respective sides. What they say does not constitute evidence.

You should not let sympathy or prejudice enter into your deliberations or your verdict. Bear in mind you are a fact finding body and that you are bound and obligated to apply the law given by the Court to the facts as you determine them. Impartiality is expected of you just as it is expected of me. Every defendant is entitled to a fair and impartial trial uninfluenced by passion, prejudice or any other emotion.

109 We now come to the law as it applies to this case. The defendant is before you by reason of the indictment of the Grand Jury which reads as follows:

> On or about April 13, 1958, within the District of Columbia, Raymond Dean made an assault on Sallie B. Alston with a dangerous weapon, that is, a pistol.

The defendant claims that the discharge of the pistol relating to the injury to the complaining witness, Sallie B. Alston, was an accident.

An accident is defined as the happening of an event without the concurrence of the will of the person by whose agency it is caused.

If a person negligently handles a firearm and as a result of his negligence the firearm is discharged and the bullet hits another human being, such a person is guilty of assault with a dangerous weapon.

It is not necessary that such person should have an intent to hit anyone or even that he should have intent to fire the firearm.

In order, however, that such person may be guilty of a crime, his negligence must be more than just a failure to exercise ordinary care, but his conduct must be reckless, showing a wonton disregard for the safety of others.

If the jury finds the defendant's conduct in the handling of the
110 firearm to be grossly negligent, reckless and wonton, showing an utter disregard for the safety of others, the jury should find a verdict of guilty.

On the other hand, if the jury finds that the firearm was discharged accidentally without any negligence on the part of the defendant or that even if the defendant was negligent it was ordinary carelessness and did not amount to gross negligence, and to recklessness and wonton conduct, the jury should find the defendant not guilty.

If you do a thing on purpose you do that which you intend to do. Now the intention that a person has in doing a certain act is to be gathered by his actions and by his words at the time and preceding the time. No man can read the secrets of the human mind. And in the administration of justice men must seek the intention and gather it from the words and action of the person involved from the testimony in the case.

Intent need not be proved directly. The jury may infer intent from the circumstances of the case as disclosed by the evidence.

The defendant is charged in the indictment, as I told you before, with an assault with a dangerous weapon. I shall now instruct you on Title 22, Section 50 of the District of Columbia Code. It provides that every person convicted of an assault with a dangerous weapon shall be
111 punished by the statute.

An assault is defined by law as an intentional unlawful attempt or effort with force and violence to do injury to the person of another coupled with the present possibility of carrying out such attempt.

You will note in that definition, by law, an assault is complete when an attempt or an effort with force or violence to do injury to another is there. It is not necessary that it be consumated by a shooting. When an assault is carried out with a dangerous weapon then the crime is called an assault with a dangerous weapon, and that is the offense with which the defendant here is charged.

A dangerous weapon may be any object which is likely to produce death or great bodily injury.

If you find that the defendant committed an assault upon the complaining witness with the definition of assault as I have described it to you, with a pistol, that would come within the definition of the statute of an assault with a dangerous weapon. A dangerous weapon may be any object likely to produce death or great bodily harm.

The Court further charges in the crime of an assault with a dangerous weapon is the use of the weapon with intent to hurt. Mere possession of a dangerous weapon without using it or attempting to use

112 it will not constitute the offense nor would the intent to use it without the use constitute the charge of an assault with a dangerous weapon.

Danger is to be estimated by the effect likely to be produced by the accident. Mark well the word "likely." Whether the weapon was used in a dangerous manner in the circumstances is a matter of fact to be determined from all of the circumstances of the case and especially by the mode of use.

No specific intent is necessary to constitute the crime other than such a general intent as may be embraced from the act of making the assault with a dangerous weapon. This embraces simply the intentional and unlawful use of a dangerous weapon by means of which an assault is done with such a weapon.

The malice with which a dangerous assault is committed may be implied by the evidence. Thus intentionally and wilfully to point a pistol at another with intent to injure him shows sufficient malice to make the assault felonious. A pistol is a dangerous weapon when used in a malicious method.

Ladies and gentlemen of the jury, your verdict may be guilty or not guilty. Your verdict must be unanimous.

Will counsel now please approach the bench?

113 (AT THE BENCH:)

THE COURT: I think you will see why I refused your instruction as being covered. I think I covered them pretty well.

MR. ROBERTSON: Yes, I think you did, Your Honor, but I don't think you covered the prayer No. 3 sufficiently.

THE COURT: What part of it?

MR. ROBERTSON: You say we contend if the Government had not ruled out the possibility of accident the shooting was accidental and then was intentional then you must acquit.

The Court of Appeals in the Williams case says that --

THE COURT: Listen. I have gone over this carefully. I have had these instructions drawn carefully. I have ruled on what you said before during the trial and I am ruling on it now.

Deny the motion, or if it is an objection I will overrule the objection.

MR. ROBERTSON: Let me say this: In Your Honor's charge you said an assault is complete when an attempt to do force or violence --

THE COURT: I didn't say that, that is the statute.

MR. ROBERTSON: How's that?

114 THE COURT: That is the legal definition. If I point a pistol at you, it's an assault.

MR. ROBERTSON: No question about it.

THE COURT: I have given the instruction on intent.

MR. ROBERTSON: Let me just say, if they find what Your Honor said, don't you think this would have to be an intentional thing?

THE COURT: The point is negligence might do it in the handling of a firearm. However, your record is complete in that you have taken exception to my refusal of your tender of instructions.

MR. ROBERTSON: Yes. I would like this to go in the record, if Your Honor please.

We object to Your Honor's characterization of the testimony of the witness as not being on material fact.

THE COURT: I copied what you said in your argument. You said it is a material fact. I mentioned that in my charge.

MR. ROBERTSON: I thought you said it was immaterial.

THE COURT: You said so.

MR. ROBERTSON: I say it is a material fact.

THE COURT: You said it was an immaterial fact. I can see why you did it. You're too good a lawyer not to.

115 MR. ROBERTSON: Your Honor, I feel that there should be mention of simple assault.

THE COURT: That is up to the discretion of the Court, and I don't think there is anything to justify simple assault. The man had a gun; the woman was hit. Therefore, I must deny that request also.

MR. ROBERTSON: Let the record show our objection to the charge as given.

THE COURT: Very well.

(IN OPEN COURT:)

THE COURT: Ladies and gentlemen of the jury:

In considering the instructions that I have given you, you are to consider them in their entirety, that is, as a whole. You are not to pick out some particular instruction and accentuate that to the overlooking of others.

Upon your return to the courtroom your foreman will state your verdict but each of you individually may be asked to state your verdict, in which case you should be prepared to do so.

Before commencing deliberations you will choose one of your members as a foreman or forelady to preside over your deliberations. Whenever you shall arrive at a verdict notify the Marshal and you will be escorted back to the courtroom to return your verdict.

116 The alternate juror is excused from further duty with the thanks of the Court for your services.

Ladies and gentlemen of the jury you will now retire to the jury room to begin deliberation and take with you a copy of the indictment.

* * * * *

117 Afternoon Session
(2:10 p.m.)

THE COURT: Bring in the jury.

(Whereupon, the jury entered the courtroom and resumed their seats in the jury box.)

THE COURT: Ladies and gentlemen of the jury:

I received your note that you sent before lunch but I thought it would be better to have you go to lunch, and that would give counsel time to go to lunch and get back here.

It has always been a wonder to me how a jury can remember all of the instructions that a Court gives. And I think what you should do, as you have done here, if there is anything that you are uncertain about in your minds with respect to what the Court said, or you don't quite remember, you should ask for further enlightenment.

The note reads:

> One of the jurors desires clarification of your instructions to the jury on the difference between accidental and careless handling of a weapon.

The instructions I gave you this morning, I think if you could have read them, should be sufficiently clear, but in any event, I will try to make them clearer if I can.

118 If a person negligently handles a firearm as a result of his negligence the firearm is discharged and the bullet hits another human being, such person is guilty of assault with a dangerous weapon. In order, however, that such person may be guilty of a crime, his negligence must be more than just a failure to exercise ordinary care. His conduct must be reckless, showing a wanton disregard for the safety of others.

It is not necessary that such person should have an intent to hit anyone or even that he should have an intent to fire the firearm. Now a person with a loaded gun, to the ordinary person of some sense, if he is going to handle that gun should exercise a little more care than if the gun was unloaded, if there was nothing in it. But, of course, it is the unloaded gun that explodes and hits somebody too.

As far as an accident would be concerned, I would illustrate it this way, although there may be others, that would be this: If a person in taking a gun from a holster or belt or his pocket should drop it on the floor, slip out of his hand and the gun explodes and hits somebody, that would be a pure accident. Or if, per chance, somebody is holding a gun in his hand and someone jostles his elbow so that he pulled the trigger or due to the shock of coming in contact with him made it explode, that
119 would be an accident. Those are several illustrations.

Now, in negligence, of course, in its very essence means careless, but it must be more than the exercise of ordinary care. It must be a reckless thing, it must be something that he shouldn't do at all.

If the jury finds the defendant's conduct in handling the firearm to be grossly negligent, reckless, wonton, showing an utter disregard for the safety of others, the jury should find a verdict of guilty.

If, on the other hand, the jury finds that the firearm was discharged accidentally without negligence on the part of the defendant, bearing in mind what I have told you about the degree of negligence or that even if the defendant is negligent, if it is ordinary carelessness and did not amount to gross negligence or reckless and wonton conduct, the jury should find the defendant not guilty.

That is what I gave you this morning, together with some oral instructions to see if I can clarify it for you. I trust that I have.

Anybody in doubt about it now? Very well.

If you are distressed or wondering about anything else, the Court is here to act on anything that will help you understand the case.

120 Therefore, you will return to your jury room and resume your deliberations.

* * * * *

THE COURT: Bring in the jury.

(Thereupon, the jury was returned to the courtroom.)

THE COURT: Take the verdict, Mr. Clerk.

THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE JURY FOREMAN: We have, sir.

THE DEPUTY CLERK: What say you as to the defendant Raymond Dean, do you find him guilty or not guilty?

THE JURY FOREMAN: We find him guilty.

* * * * *

[Filed November 10, 1959]

PRAYERS FOR INSTRUCTIONS TO THE JURY - PRAYER NO. 1

It is incumbent upon the prosecution to prove each and every material allegation of the indictment and every element of the offense charged beyond a reasonable doubt. In other words the prosecution must prove beyond a reasonable doubt that the assault upon the complaining witness was not accidental. If you have a reasonable doubt as to whether or not the assault was accidental or done unintentionally, then you must acquit the defendant.

DESON V. U.S.
97 A. 2 135

DAVENPORT V. U.S.
60 A. 2 226

[Refused as covered - Jackson, J.]

[Filed November 10, 1959]

PRAYERS FOR INSTRUCTIONS - PRAYER NO. 2

If you believe that any witness wilfully has testified falsely as to any material matter, as to which she could not be materially or reasonably mistaken, you are at liberty to disregard all or any part of the testimony of such witness.

[Refused as covered - Jackson, J.]

PRAYERS FOR INSTRUCTIONS - PRAYER NO. 3

The prosecution must prove every material element of the offense charged beyond a reasonable doubt. In the case of an assault, the prosecution must prove that the assault was intentional. The government must prove not only the shooting, but that it was unlawful; in other words, that it was not accidental or innocent. You must acquit the defendant unless every material and necessary fact upon which a conviction depends is proven, to the satisfaction of each individual juryman, beyond a reasonable doubt.

If the government has not, by its proof, ruled out the possibility of accident, or the evidence just as reasonably supports the proposition that the shooting was accidental as that it was intentional, then you must acquit.

EGAN V. UNITED STATES
52 U.S. App. D.C. 384

WILLIAMS V. UNITED STATES
76 U.S. App. D.C. 299

DAVENPORT V. UNITED STATES
60 A. 2 226.

[Refused as covered - Jackson, J.]

[Filed January 11, 1960]

JUDGMENT AND COMMITMENT

On this 8th day of January, 1960 came the attorney for the government and the defendant appeared in person and by counsel, Julius Robertson and Dovey Roundtree, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ASSAULT WITH A DANGEROUS WEAPON as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) years to Nine (9) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JOSEPH R. JACKSON
United States District Judge

The Court recommends commitment to: Lewisburg, Penn.

[Filed October13, 1960]

MOTION TO VACATE JUDGMENT AND; SET-ASIDE ILLEGAL SENTENCE Pur. To Sec. 2255 T. 28, U.S.C.

Comes now the defendant, Raymond Dean pursuant to title 21, Sec. 2255 (2nd, Supl; and moves to the Court to set-aside, or vacate Judgment that imposed upon him, release, and discharge him from

imprisonment upon the Following grounds and reason.

JUDGMENT OF COURT

on the 8th day of January 1960, Petitioner was upon a plea of not guilty, and a Verdict of guilty of the offence of Assault With A Dangerous Weapon, Sentenced to serve imprisonment for a period of from Three (3) years to Nine (9) years.

CONTENTION

(1) Ineffective Counsel:

Counsel being so ineffective that his representation deprive Petitioner of his rights under the (6) Sixth Amendment of the Constitution.

(2) Honorable Judge made a Statement to the jury, that because the Prosecuting Witness answer a question falsely, did not mean that the prosenting Witness testimony was all untrue.

Petitioner States that this ruling by the Honorable Judge is incorrect: The following legal argument is taken from (Murray v. U. S. 10 F 2d 409.) The Credibility of the evidence, and the Weight to be given thereto, are for the jury alone.

(3) The Prosecuting Witness was evading to question on the Witness Stand to What Statement She made to Police Officer at the time this accident occured.

In (Pfaff v. U. S., 85 F. 2d 309, 311) the Court rule that it rests with the Court to see that the trial of a Criminal Case results in the finding and pronouncement of the truth. (U. S. v. Breen 2 Cir., 96 F 2d. 782, 794.) A Judge is more than a moderator, he is charge to see that the law is properly administered and it is a duty which he cannot discharge by remaining inert.

(4) Honorable Judge Stop Police Officer from giving his testimony about What report the Police Officer recivied at the time accident occurred: By ruling that the Police Officer was not there and he did not know What happen; so the Police Officer testimony could only be hearsay.

This ruling by the Judge is incorrect: The following legal argument is taken from 3 Wigmore §§1420, 1630, 1667. The Hearsay Rule

The theory of the hearsay Rule is that the many possible sources of the inaccuracy and untrustworthiness which may lie underneat the bare untested ascertion of a Witness can thus be brought to light and exposed; if they exist, by the test of cross examination.

(Greenberg v. U. S. 3F. 2d 226) Thus the Court had no right to reject testimony tendered in the defendant's behalf because of its improbability, that is for the jury to determine.

(5) Honorable Judge Statement to the jury about petitioner defence of accident were confusing and conflicting

In (Dyson v. U. S., D.C. Mun. App. 1953, 97 A. 2d 135) In Assault Prosecution, it was incumbent upon the Goverment to show that the act of the defendant was not accidental and that he had necessary criminal intent.

(6) Petitioner being denied of his rights to a preliminary hearing in the District of Columbia, "This is not due process of law," and a true violation of the Federal Rules of Criminal procedure.

The purpose of a preliminar hearing is to decide between the informen or proscutor and the accused on the preliminary question of his temporary restraint and therefore it must be judical in essential procedure. (Wood v. U. S. 128 F. 2d 265)

/s/ RAYMOND DEAN
Petitioner Pro.

Dated: 10/10/60

Where for petitioner prays that he be allowed to docket and proceed with his appeal in this Court Without being required to prepay fees or cost, or to give security therefor.

/s/ RAYMOND DEAN

* * *

I, Raymond Dean, being first duly sworn, according to law, on oath depose and say that the matters and things stated in the foregoing motion and affidavit by me subscribed as fact are true, and that these matter and things stated thein as upon information and belief I believe to be true.

/s/ RAYMOND DEAN

* * *

[JURAT dated October 10, 1960]

MOTION TO PROCEED IN FORMA PAUPERIS

(1) That the defendant is Without Funds to sustain cost of the Court proceedings.

(2) That the defendant is a citizen of the United States, and should be entitled to redress.

(3) That the attached affidavit is true, and the proceedings are embodie in good faith, and are not frivious or malicious.

Respectfully, Submitted

/s/ RAYMOND DEAN
Defendant

State of Pennsylvania
County of Union

Dated: 10/10/60

/s/ Paul D. Peters
Parole Officer

[Filed February 23, 1961]

October 17, 1960

Judge Jackson

Motion filed in Proper Person.

Deft: Raymond Dean

Case No. 896-59

Motion: Motion of Deft. to vacate judgment and set aside sentence pursuant to T. 28 USC 2255.

[Denied: Jackson J.]

Please return to the Assignment Office